No. 291.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NEW JERSEY WOOD FINISHING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION OF REYNOLDS METALS COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Reynolds Metals Company hereby respectfully moves for leave to file the accompanying brief *amicus curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The attorneys for the respondent have stated by letter to undersigned counsel that they decline to consent, but "would not oppose" this motion.

Movant is directly interested in the case because it is the defendant in a treble-damage suit, **Highland Supply Corporation v. Reynolds Metals Co.**, Civ. No. 63 C 53(2), now pending in the United States District Court for the Eastern District of Missouri, in which the exact issue to be determined in this case is presented—whether Federal

Trade Commission proceedings toll the federal four-year statute of limitations under § 5 (b) of the Clayton Act (15 U. S. C., § 16 (b)). The United States Court of Appeals for the Eighth Circuit answered this question in the negative on February 13, 1964. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725. The court below answered this question in the affirmative on May 20, 1964, thus creating a direct conflict between the Eighth and Third Circuits.

In the Eighth Circuit case, the court of appeals, while holding that FTC proceedings do not toll the statute of limitations, remanded the case to allow the plaintiff an opportunity to amend its complaint. Plaintiff declined to seek *certiorari*, and on remand filed an amended complaint. Movant here has filed in the district court a motion to dismiss the amended complaint, which motion is now under submission. Thus, the case in which movant is involved is still very much alive. Presumably, if this Court were to affirm the lower court in this case, plaintiff in the Eighth Circuit case would request reconsideration of the same issue in that case. Such an eventuality would drastically alter the issues in that case, and could greatly increase movant's potential liability. Thus, movant has a clear, direct monetary interest in the decision of this case.

Movant believes that it can make a definite contribution to the Court's analysis of the statute in question because movant's case presents an issue which is not raised by the facts of this case but which, movant contends, will necessarily be decided by this case, and in fact was decided by the Third Circuit. That issue is whether an FTC order is admissible as *prima facie* evidence under § 5 (a) of the Clayton Act (15 U. S. C., § 16 (a)). In the case at bar, the FTC proceedings resulted in a consent order which is clearly not admissible as *prima facie* evidence because the proviso to § 5 (a) excludes from its scope

"consent judgments or decrees entered before any testimony has been taken." (Emphasis added.) . In the **Highland Supply** case, on the other hand, the FTC proceedings were contested, and the order was enforced (after modification) by the court of appeals.

While the issue of admissibility was not directly before the Third Circuit, it is inextricably intertwined with the tolling issue. Movant's brief contends, *inter alia,* that: (1) the tolling provisions of § 5 (b) are designed to facilitate use of a judgment or decree admissible as *prima facie* evidence under § 5 (a); (2) FTC orders are not so admissible; (3) therefore FTC proceedings do not toll the statute of limitations.

Because the two issues are so intertwined, it is not surprising that the Third Circuit decided the issue of admissibility as well as tolling, even though it was not directly presented. The opinion of the Third Circuit, in passing, has apparently ruled that either the FTC order itself, or the judicially enforced order, or both, would somehow be admissible as *prima facie* evidence. It may be foreseen that this Court, also, in deciding the tolling question, will decide the admissibility question; indeed, that is Question No. 2 of the Questions Presented by the Petition for Certiorari. Yet petitioner has briefed that issue only collaterally. Movant has a direct interest in that issue, and the attached brief discusses the issue fully.

Movant believes that its direct briefing of § 5 (a) will be of substantial value to the Court because: (1) Prior to the district court decision in this case, all of the cases on § 5 of the Clayton Act directly involved only § 5 (a); (2) Most of the secondary authorities discuss § 5 (a) only; (3) Much of the applicable legislative history deals with § 5 (a); (4) The question of the admissibility of administrative orders in judicial proceedings as *prima facie* evidence raises questions as to the use of hearsay and other non-

judicial evidence in administrative proceedings, which questions are not raised by the limitations issue. These issues are fully and directly discussed in movant's brief, together with authorities demonstrating the interdependence of the two subsections of § 5.

Wherefore, movant prays that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR REYNOLDS METALS COMPANY AS AMICUS CURIAE.

Reynolds Metals Company, with leave of this Court, respectfully presents this brief in support of the petitioner.

INTEREST OF AMICUS CURIAE.

The interest of Reynolds Metals Company as *amicus curiae* is set forth in the motion for leave to file this brief *amicus*, to which motion this brief is attached.

STATUTES INVOLVED.

15 U. S. C., § 15 b, provides as follows:

> Any action to enforce any cause of action under sections 15 or 15a of this title **shall be forever barred unless commenced within four years** after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.[1]

Section 5 of the Clayton Act, as originally enacted in 1914, read in pertinent part as follows:

> A **final judgment or decree** hereafter rendered in any **criminal prosecution** or in any **suit or proceeding in equity brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said **judgment or decree** would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent **judgments or decrees** entered before any testimony has been taken. . . .
>
> Whenever any **suit or proceeding in equity** or criminal prosecution is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof. .

[1] Emphasis has been added throughout this brief unless otherwise noted.

As amended in 1955, § 5 (15 U. S. C., § 16) reads as follows:

(a) A **final judgment or decree** heretofore or hereafter rendered **in any civil or criminal proceeding brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent **judgments or decrees** entered before any testimony has been taken or to **judgments or decrees** entered in actions under section 15a of this title.

(b) Whenever **any civil or criminal proceeding** is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

SUMMARY OF ARGUMENT.

1. The direct issue in this case is a clear-cut question of statutory interpretation: Did Congress, in enacting § 5 of the Clayton Act, intend thereby to toll the statute of limitations for private antitrust actions during the pendency of Federal Trade Commission proceedings?[2] Section 5 was part of the original Clayton Act passed in 1914, and underwent a minor language revision in 1955. Thus, logical analysis divides the issue into two distinct questions: Did Congress, in 1914, intend § 5 to apply to FTC orders and proceedings? If not, did Congress, in 1955, intend to enlarge § 5 to make it applicable to FTC orders and proceedings?

The answers were clearly dictated by 49 years of settled law, which had been broken only by the district court decision in this case, and thereafter firmly reestablished by the United States Court of Appeals for the Eighth Circuit and three district courts. The court below, while failing to analyze these questions in detail, still effectively conceded that the answer to each of these questions is "No," and, for the first time, raised a question which no other court has ever dignified with recognition: Did Congress, in 1959, in making FTC orders final if review is not sought within a limited time, thereby intend to bring FTC proceedings within the scope of § 5 of the Clayton Act? Only by asking this novel question, and answering it in the affirmative, was the court below able to circumvent the established rule. Although the lower court rested its novel

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[2] We put to one side the recent decision of *Gottesman v. General Motors Corp.*, 221 F. Supp. 488, 493 (S. D. N. Y. 1963), holding that "There can be no claim for money damages for violation of section 7 [of the Clayton Act]." That holding was explicitly approved in *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F. 2d 725, 728 n. 3 (8th Cir. 1964). Since that issue was neither briefed nor decided in the courts below, and was not presented in the petition for a writ of certiorari, it is respectfully submitted that the issue is not presently before this Court.

decision entirely on the Finality Act of 1959, it is necessary to analyze the statutory language, the legislative history, and the pre-1959 authorities in order to demonstrate that Congress, in 1959, had no intent to effect such a drastic change in the settled law.

2. The central purpose of tolling the statute of limitations during the pendency of litigation brought by the United States is to permit a private treble-damage plaintiff to make use of a judgment or decree against the defendant. Section 5 (a), embodying language substantially similar to the language of § 5 (b), makes certain judgments or decrees admissible as *prima facie* evidence of the defendant's violation of law. If the government proceedings **cannot**, under any circumstances, result in an admissible judgment or decree, there is no reason to toll the statute. Because FTC proceedings result in an order which **cannot** constitute such a judgment or decree, therefore, Congress has not provided for tolling the statute during FTC proceedings.

An FTC order is not admissible under § 5 (a) because it fails to meet any of the three specific requirements of that statute. It is not a "final **judgment or decree**" rendered in a "**suit or proceeding in equity**" which has been "**brought by or on behalf of the United States.**". Had Congress desired to include FTC proceedings, Congress could easily have said so. But all of there requirements are clearly judicial in nature. The FTC is not a judicial tribunal, nor are its proceedings judicial proceedings, nor are they brought by or on behalf of the United States.

Even if the language of § 5 (a) did not clearly and unambiguously exclude FTC orders and proceedings, the legislative history would demonstrate that Congress did not intend FTC orders to be *prima facie* evidence.

All of the reported cases except the instant case have uniformly refused to admit FTC orders as "prima facie" evidence. The district court decision in this case has now

been considered and rejected by the United States Court of Appeals for the Eighth Circuit and three district courts. The only decision arguably to the contrary cited by the court below was specifically "**withdrawn**" on rehearing, and has since been further repudiated by the same court. All of the secondary authorities that research has disclosed have agreed that § 5 (a) does not apply to FTC orders.

The court below conceded that the 1955 amendment to the Clayton Act made no change in the requisites for admissibility. The only arguably relevant change in the language of § 5 was the substitution of the phrase "civil proceeding" for "suit or proceeding in equity." Legislative history clearly demonstrates that no substantive change was intended in 1955. Congress was well aware of the prior decisions excluding FTC orders from § 5 (a), and did not insert the term "agency proceedings," which is used in the Administrative Procedure Act and elsewhere for such proceedings. Congress merely changed the wording of § 5 to conform to Rule 2 of the Federal Rules of Civil Procedure, for there is no longer any such action in the federal courts as a "suit or proceeding in equity."

The 1959 Finality Act is totally irrelevant to the issue of admissibility. It does not affect § 5 in any way. Legislative history demonstrates that there was no intent to affect the scope of § 5. The only requisite of § 5 which it could possibly satisfy is that of finality, which is not an issue here. It does not affect the nature of the FTC nor of FTC proceedings. **Its sole purpose was to simplify enforcement of FTC orders by shifting the burden of seeking review from the FTC to the respondent.** An argument based on the 1959 Act was presented to the Eighth Circuit and two district courts, and not even considered worthy of comment by those courts. In any event, it has no possible relevance to the limitations issue.

Admission of FTC orders as *prima facie* evidence in treble-damage suits would require a fundamental re-evaluation of administrative procedures, for the specific rationale applied by this Court in allowing administrative agencies to rely on hearsay and other judicially incompetent evidence is that the effect of an FTC order is not to punish for past conduct, but to ban specific practices for the future.

3. Aside from the effect of § 5 (a) on the tolling statute (§ 5 (b)), if one considers § 5 (b) alone it is clear that the statute of limitations is not tolled by FTC proceedings. They do not meet the specific statutory requirements. An FTC proceeding is not a "suit or proceeding in equity." Furthermore, § 5 (b) requires a proceeding "instituted **by the United States.**" Even if an FTC proceeding could be said to be "brought **on behalf of the United States**" (the language of § 5 (a)), it is still not "instituted **by** the United States," for both this Court and Congress have always clearly distinguished between "the Commission" and "the United States," recognizing not only that they are separate parties ("the Commission" may sue and be sued in its own right) but that, at least for some purposes, they are not even in privity.

The history of the 1914 legislation demonstrates that Congress did not intend FTC proceedings to toll the statute of limitations. On the contrary, Congress, apparently acting from an abundance of caution, deliberately struck from the tolling provision the phrase "on behalf of" the United States, carefully limiting the tolling provision to actions "instituted **by** the United States."

The 1955 amendment did not enlarge the scope of § 5 (b), for FTC proceedings are not "civil proceedings," and Congress had no intent to change the existing law.

The Finality Act of 1959 is totally irrelevant to the limitations issue.

The court below attempted to find some of the requisites of § 5 in the appellate enforcement proceedings, rather than in the FTC proceedings. The effort was based principally on the fundamental misunderstanding of the court below that the enforcement proceedings are original, rather than appellate, in nature, and, in any event, the effort would lead to the absurd result of tolling the statute of limitations indefinitely.

The decision below is directly contrary to that of all the other courts which have considered the issue, and to the time-honored consensus of the antitrust bar.

4. If there are reasons why it would be desirable, today, to toll the statute of limitations for FTC proceedings, such reasons present a question for study and consideration by Congress, not for legislation by this Court.

ARGUMENT.

I. The Court Below Failed to Analyze the Real Issues.

The principal question presented in this case is whether the four-year statute of limitations for treble-damage actions under the antitrust laws is automatically tolled by the commencement of FTC proceedings. The tolling statute, § 5 (b) of the Clayton Act, was originally enacted in 1914, and amended in certain minor respects in 1955. The FTC was originally created in 1914, also, by the FTC Act, which has not subsequently been amended in any significant respect. Accordingly, the question presented must be analyzed as two separate questions:

1. Did Congress, in 1914, intend § 5 of the Clayton Act to apply to FTC orders and proceedings?

2. If not, did Congress, in 1955, in enacting a four-year statute of limitations, intend to enlarge § 5 to make it applicable to FTC orders and proceedings?

The court below failed to analyze these questions distinctly. Starting with the irrelevant Finality Act of 1959, which simply made FTC orders enforcing the Clayton Act final without judicial enforcement, the court ignored 45 years of settled law, and concluded that somehow the requirements of § 5 (b) of the Clayton Act are now met by an FTC proceeding. In so doing, the court lost sight of the language and purpose of § 5 of the Clayton Act, and indeed filed an opinion which is, itself, internally inconsistent.[3] Although the court below properly ruled (apparently) that the answers to the two questions above are negative, nevertheless, the reasons for those answers

[3] See page 102, *infra*. In addition, the court below relied principally on an opinion of the Second Circuit which had already been withdrawn by that circuit (see pages 29-33, *infra*), and secondarily upon a decision of the Seventh Circuit which had already been set aside by this Court (see pages 19-20, *infra*).

must be analyzed in detail here, so that the limited impact of the Finality Act of 1959 may be fully understood.

For 49 years, from the enactment of the Clayton Act (and the FTC Act) in 1914 until 1963, no court had ever held that Congress ever intended § 5 to apply to FTC orders and proceedings. Such a holding would not only have contradicted the express language and legislative history of both statutes, but would also be repugnant to the fundamental purpose of Congress in enacting: (1) the FTC Act; (2) the tolling provisions of § 5; and (3) the 1955 four-year statute of limitations for treble-damage actions.

II. FTC Proceedings Do Not Result in Admissible Judgments or Decrees, and Therefore Are Not Intended to Toll the Statute of Limitations.

The simple purpose of tolling the statute of limitations during the pendency of civil or criminal actions instituted by the United States was to permit a private treble-damage claimant to await the outcome of the government litigation so that he could take advantage of a "judgment or decree" adverse to the respondent, which would be admissible under § 5 (a) as "prima facie" evidence. Because FTC proceedings do not result in any admissible "judgment or decree," it would make no sense to toll the statute of limitations during such proceedings.

A. The FTC's Cease and Desist Order Is Not Admissible in a Treble-Damage Suit as "Prima Facie Evidence" under § 5 (a) of the Clayton Act, 15 U. S. C., § 16 (a).

1. The Decision Below Conflicts With the Express Congressional Purpose That an FTC Order Should Have Only Prospective Effect.

To rule that FTC orders were to become admissible as "prima facie" evidence, like a "judgment or decree" of a

court, would be repugnant to the expressed congressional desire that the regulatory powers of the FTC were to operate prospectively only. The novelty and uncertainty of the laws which the FTC was empowered to enforce, coupled with the then highly controversial status of non-judicial enforcement of the antitrust laws, and the relatively loose procedures permitted in administrative proceedings, led Congress to limit the FTC to restraint of future violations. Proposals to give the FTC power to punish or fasten liability upon respondents were emphatically rejected. See pp. 44-46, *infra*. Admission of an FTC order in a private judicial proceeding would thus give to such orders the very retrospective effect which Congress deliberately rejected.

Further, an FTC order is based to an unknown degree on hearsay and other incompetent evidence, admitted under non-judicial procedure in hearings where the prosecutor and judge are the same persons. Admission of such an order as *prima facie* evidence would be even more repugnant to judicial standards, and to the expressed desire of Congress, than would admission of such evidence itself, for, when the order alone is admitted, the jury would have no opportunity to devalue or ignore the judicially incompetent evidence. See **Wright v. Carter Products, Inc.**, 244 F. 2d 53, 59 n. 4 (2d Cir., 1953).

Congress accordingly had good reason to provide that a judgment or decree of a United States court should be admissible as "prima facie evidence," while withholding comparable effect from an FTC order. However, the court below has attempted to draw a distinction between FTC enforcement of the Clayton Act and FTC enforcement of the FTC Act. The point which the court below appears to have been making is that, while the FTC was intended to act only prospectively when enforcing the FTC Act, it does act retrospectively and inflict punishment when dealing with violations of §§ 2, 3, 7, and 8 of the Clayton

Act (See R. 74-78). It may be assumed that Congress could have drawn the distinction the Court below attempted to establish; the question is whether Congress actually did so. The debates abound with statements concerning the prospective nature of the FTC. Nowhere is there any hint that it should have a different function in enforcing the Clayton Act.

Not only do the cases cited by the court below fail to establish any such distinction; some of them firmly negate it. For example, **Standard Oil Co. v. FTC**, 282 Fed. 81, 86-87 (3d Cir., 1922), **aff'd**, 261 U. S. 463 (1923), is cited for the proposition that: "The Sherman Act was to serve as a guide for the Commission, as a 'declaration of policy', to be considered in determining what constituted an unfair method of competition" (R. 76). Actually, the FTC had charged Standard Oil with violation of both § 5 of the FTC Act and **§ 3 of the Clayton Act.** The court indicated no distinction in the functions of the commission in enforcing the two acts, and in fact, specifically stated that the above-quoted principle applied to cases under **both** Acts.

Moreover, the distinction does not advance the court's argument that § 5 applies to FTC orders and proceedings. The court concedes that Congress, in 1914, did not intend a "bare FTC order" to be admissible as *prima facie* evidence (R. 87). Yet, the FTC's functions in enforcing the FTC and Clayton Acts have undergone no substantial change since 1914. Thus, the court's "distinction" was just as persuasive, if at all, in 1914, when the court concedes that the FTC order was inadmissible.

Finally, the specific rationale which justifies admission of hearsay and other judicially incompetent evidence in FTC proceedings is that: "[T]he effect of the Commission's order is **not to punish or to fasten liability on respondents for past conduct,** but to ban specific practices for the future in accordance with the general mandate

of Congress." **FTC v. Cement Institute**, 333 U. S. 633, 706 (1948). Yet the court below has held that this principle does not apply to FTC enforcement of the Clayton Act! That holding must lead to one of only three possible conclusions: (1) The FTC can admit hearsay and other judicially incompetent evidence in hearings to enforce the FTC Act but not in hearings to enforce the Clayton Act; (2) This Court was wrong in the **Cement Institute** case; or (3) The Third Circuit is wrong. Number (3) certainly seems the most likely answer to the dilemma.

2. The Original Language of § 5 (a) Describes Only Judicial Proceedings, and Cannot Be Applied to Administrative Proceedings.

As originally enacted, the first paragraph of § 5 (now § 5 (a)) read:

> "A **final judgment or decree** hereafter rendered in any **criminal prosecution** or in any **suit or proceeding in equity brought by or on behalf of the United States** under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent **judgments or decrees** entered before any testimony has been taken. . . ." 15 U. S. C., § 16 (a).

Had Congress desired to include Federal Trade Commission proceedings within this section, Congress could easily have said so. But all relevant language in this section is judicial in tone. Federal Trade Commission proceedings are not judicial proceedings: "The Commis-

sion exercises only the administrative functions delegated to it by the act, not judicial powers. . . ." **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927). The FTC itself is not a judicial tribunal. **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972-73 (D. Maine 1963); **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, Trade Reg. Rep. (1958 Trade Cas.), ¶ 69132 (N. Y. Sup. Ct. 1958). Hence, the statute as a whole demonstrates that FTC proceedings are not within its ambit.

This proposition becomes doubly clear when the specific requirements of the section are analyzed. The court must:

> "determine that the decree complies with the requirements of section 5 before it may be admitted in evidence. There must be strict compliance for it is clear that no decree in any antecedent government anti-trust proceeding would be admissible in a private treble damage action, but for the provisions of section 5 of the Clayton Act." Timberlake, **The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws**, 36 N. Y. U. L. Rev. 991, 994 (1961).

a) An FTC Order Is Not a "Judgment or Decree."

Jurisdiction of certain Clayton Act violations is granted to the FTC (and the ICC, the FCC, the CAB, and the Federal Reserve Board), by § 11 of that act, 15 U. S. C., § 21. If the commission is "of the opinion" that one of these sections is being violated, it "shall issue and cause to be served on such person an **order** requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held . . ." etc. Time and again throughout this section (and § 5 of the FTC Act, 15 U. S. C., § 45) the term "order" appears. Nowhere is the commission authorized to issue a "judgment or decree." "The Federal Trade Commis-

sion does not render a 'judgment or decree'. Its authority is limited to that of issuing a cease and desist 'order' to curb violations of the antitrust laws." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963).

Nowhere in § 5 of the Clayton Act does the term "order" appear. These are terms of art, and Congress is well acquainted with their proper usage. For example, in § 5 of the FTC Act (enacted simultaneously, in 1914), the FTC is empowered to issue an "order" which is reviewable in the court of appeals. The court "shall have power to make and enter a **decree** affirming, modifying or setting **aside the order of the Commission**, . . ." Congress meticulously provided that "[n]o **order** of the Commission or **judgment** of court to enforce the same shall" absolve a **respondent of liability.** 15 U. S. C., § 45.

"Judgments" and "decrees" are traditionally issued by courts on the "law" side and "equity" side respectively. Federal Trade Commission orders "are administrative orders as distinguished from judicial decrees." **National Candy Co. v. FTC**, 104 F. 2d 999, 1004 (7th Cir.), **cert. denied**, 308 U. S. 610 (1939). In the Administrative Procedure Act, Congress carefully used the term "order," and defined it as "the final disposition . . . **of any agency** in any matter other than rule making . . . ." 5 U. S. C., § 1001 (d). "The FTC does not render a judgment or decree; its authority, as a quasi-judicial body, is limited to that of issuing cease and desist orders." Butler, **Application and Constitutionality of Tolling of Statute of Limitations Provisions of Section 5, Clayton Act, In Cases of Dual Enforcement Jurisdiction**, 8 A.B.A. Antitrust Section 42, 46-47 (1957). [Hereinafter cited as Butler.] **Accord**, Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 794-95 (1964). The FTC order fails to meet the first requirement.

The lower court did not even contend that the FTC order is a "judgment or decree," and, in fact, fairly clearly concedes that it is not. Rather, the court below held that, at least from 1914 to 1959, it was the decree of the court of appeals enforcing the FTC order which satisfied the statutory requirement:

> "While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a 'final judgment or decree,' within Section 5 (a)" (R. 87-88).

However, the judicially enforced order is still the order of the FTC, and not the "judgment or decree" of the court of appeals. See **Chain Institute v. FTC**, 246 F. 2d 231, 239 (8th Cir.), **cert. denied**, 355 U. S. 895 (1957); **American Chain & Cable Co. v. FTC**, 142 F. 2d 909 (4th Cir. 1944).. "Under Rule 3.27 of the Commission's Rules of Practice, an order is not regarded as the judgment or decree of a court after judicial affirmance; it continues to be the Commission's order, which the Commission can, at any time, 'reopen, alter, modify or set aside.'" Butler 50-51; see 16 C. F. R., §§ 3.27, 3.28 (b). The FTC has the power to proscribe the alleged violations of law, and the court of appeals has only a limited power to review the FTC proceedings. There are many other legal and logical objections to utilizing the appellate review to satisfy the requirements of § 5. These objections are discussed immediately *infra* in connection with the requirement for a "suit or proceeding in equity."

b) An FTC proceeding is neither a "Criminal Prosecution" nor a "Suit or Proceeding in Equity."

Obviously, an FTC proceeding is not a "criminal prosecution." It is equally obvious that it is not a "suit or

proceeding in equity."[4] **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964); **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972-73 (D. Maine 1963); Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 795 (1964). The Commission "has not been delegated the authority of a court of equity." **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927). This Court has quite recently recognized "Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, . . ." **United States v. The Philadelphia National Bank**, 374 U. S. 321, 339 n. 17 (1963). For example, the FTC has no power to punish for contemptuous refusal to obey a subpoena, but must apply to a district court for enforcement of its processes. 15 U. S. C., § 49. Nor does it have power even to seek punishment of those who defy its orders, but must rely upon the Attorney General of the United States to bring a civil action for penalties. 15 U. S. C., § 21 (l). See **Proper v. John Bene & Sons**, 295 Fed. 729, 732 (E. D. N. Y. 1923); Beer, Federal Trade Law and Practice 429 n. 53 (1942); McDonald, **Proof of Conspiracy: The Prima Facie Rule**, 1952 CCH Antitrust Law Symposium 59, 62 [hereinafter cited as McDonald].

Congress, in choosing this language, was simply adapting § 5 to the provisions of the Sherman Act. Both §§ 4 and 9 of the Sherman Act (15 U. S. C., §§ 4, 9) provided that "[I]t shall be the duty of the several district [now "United States"] attorneys . . . to institute proceedings in equity to prevent and restrain such violations." Thus, "the phraseology of the Sherman Act makes indelibly clear the kind of suits that were meant." Butler 46. The FTC proceeding is not such a "suit."

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[4] *Cf. Columbia Gas & Electric Corp. v. American Fuel & Power Co.*, 322 U. S. 379, 383 (1944): "[A] bankruptcy proceeding is not itself a suit in equity either by statutory definition or in common understanding."

The opinion below concedes that, at least from 1914 to 1959, an FTC proceeding was not a "suit or proceeding in equity." However, the court stated that "[t]he 'proceeding in equity' therefore was not the Commission proceeding but the proceeding before the Court of Appeals from which a judgment or decree would issue determining and restraining a violation of the Act." R. 84. There are a number of barriers to this unique detour around 50 years of clear legislative history, judicial authority, secondary authority, and established practice.

Congress, in 1914, when it enacted § 5, was dealing only with "judgments and decrees" rendered in original proceedings, not appeals. For example, Congressman Floyd stated: "Such decree imports absolute verity, binding upon the Government and the party to the suit, both as to findings of fact and questions of law determined in the suit." 51 Cong. Rec. 9489 (1914). A court of appeals does not normally make "findings of fact," but accepts the findings below if they are supported by "substantial evidence", or rejects them if they are not. Moreover, appellate review is not normally deemed a separate "suit."

In reviewing FTC proceedings, the court of appeals does not hear the evidence and conduct a trial *de novo*. The court does not even weigh anew the evidence heard below. "The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U. S. C., § 21 (c); **Timken Roller Bearing Co. v. FTC**, 299 F. 2d 839 (6th Cir.), **cert. denied**, 371 U. S. 861 (1962). Moreover, "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." **Jacob Siegel Co. v. FTC**, 327 U. S. 608,

611-12 (1946). Indeed, in 1914, the congressional debates specifically recognized that the judicial review of FTC proceedings was intended to be appellate in nature: "In case he [the offending party] does not comply, the commission or board may bring suit in some circuit court for the enforcement of the notice. The party is treated just the same as if he had **appealed** from a judgment of a district court to the circuit court of appeals." 51 Cong. Rec. 16281 (1914) (remarks of Rep. Volstead).

The court below apparently realized that its unique circumvention of all previous authority is tenable only if the review of an FTC order is essentially an **original** rather than an **appellate** proceeding: "In formulating its **findings** and order, it [the FTC] presented itself in a manner analogous to a Master in Equity to the Court of Appeals . . . which sat not as an Appellate Court but as a court of equity enforcing, modifying or setting aside the orders of the FTC." R. 83-84. The first authority cited for this proposition is **C. E. Niehoff & Co. v. FTC**, 241 F. 2d 37, 42 (7th Cir. 1957). In that case, it is true that the Seventh Circuit held that its jurisdiction was "original" rather than "appellate," and withheld enforcement of the FTC order. However, the court below was apparently unaware that, in a *per curiam* opinion, this Court vacated and remanded the Seventh Circuit decision, directing that court to enforce the FTC order. 355 U. S. 411 (1958). The result is not surprising in light of this Court's specific holding in **FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623-24 (1927):

> "[A] Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being **appellate** and **revisory**

merely, and not an exercise of **original** jurisdiction by the court itself."

In addition to the repudiated **Niehoff** case, the court below cited three earlier authorities in attempting to establish that the court of appeals' jurisdiction in enforcing FTC orders is original rather than appellate: **FTC v. Fairyfoot Prods. Co.**, 94 F. 2d 844 (7th Cir. 1938); **Butterick Co. v. FTC**, 4 F. 2d 910 (2d Cir. 1925); and **L. B. Silver Co. v. FTC**, 292 Fed. 752, 753 (6th Cir. 1923). The latter two cases, it is true, contain dicta supporting this proposition. Both were specifically cited to this Court by the respondent in the **Niehoff** case and, of necessity, were rejected by the *per curiam* opinion therein.

Further, those cases were cited in a footnote to **FTC v. Ruberoid Co.**, 343 U. S. 470, 479 n. 19 (1952), where this Court pointed out a fundamental objection to the novel suggestion of the court below that the court of appeals' judgment or decree was admissible under § 5 (a): "There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right." 343 U. S. at 479-80.

Thus, if the judicial review were to subject defendant to the danger that the resulting judgment could be used against him in a subsequent treble damage action, there would in effect be a penalty upon the exercise of the right of review. Such a result would be unfair, if not unconstitutional, and no such intention should be imputed to Congress. See Seeley, **The Pitfalls Which Lurk in Government Litigation for Defendants Who May Be Subjected to Treble Damage Actions**, 4 Antitrust Bull. 17, 20 (1959).

Further, legislative history demonstrates clearly, not only that Congress did not intend to include FTC orders and proceedings in the scope of § 5, but that there was

not the slightest intention that appellate review of FTC orders and proceedings would be included. The repeated references to "trials" and "jury trials" and to suits instituted by the "Attorney General" are not answered by the lower court's ingenuity; nor is the repeated complaint by opponents of the bill that, after all was said and done, the respondent would "preserve his swag," having suffered no loss from the FTC proceedings. See pp. 44-46 *infra*.

Finally, the court below applied this innovation in the antitrust laws **only** to the question of the admissibility of the FTC order. Nowhere does the court state when, under this new interpretation, the statute of limitations would be tolled. As is demonstrated at pp. 92-93 *infra*, this innovation cannot be applied to the tolling provision in any way that will make sense.

c) **An FTC proceeding is not "brought by or on behalf of the United States."**

At a superficial glance, an FTC investigation might be considered to have been brought "by or on behalf of the United States." However, an action brought "by the United States" is normally considered to be an action brought by the Attorney General. An agency which can sue or be sued in its own right is not "the United States," nor is it acting "on behalf of" the United States. See the authorities cited at pp. 85-92 *infra* relating to § 5 (b).

The court in **Proper v. John Bene & Sons**, 295 Fed. 729, 732 (E. D. N. Y. 1923), though not specifically ruling on this point, indicated considerable doubt whether an FTC proceeding is "brought by or on behalf of the United States." See **Beer, Federal Trade Law and Practice** 429 n. 53 (1942); McDonald 62.

Finally, repeated references in the congressional debates on this section to suits by the "Attorney General"

(see discussion of legislative history at pp. 41-43 *infra*), coupled with the absence of any reference in the discussion of this section to suits brought by the FTC, demonstrate legislative intent to limit § 5 to Justice Department suits or prosecutions. Accordingly, the FTC order fails to meet the third requirement.

It is notable that, even if the FTC proceedings could be regarded as being "brought on behalf of the United States," the same could not be said for the appellate review proceedings on which the court below relied. Review would frequently (and, since 1959, invariably) be sought by the respondent, not by the FTC.

A possible explanation for the phrase "on behalf of" in § 5 (a) may be found in an amendment to the bill which was offered and rejected. This amendment would have authorized the attorney general of any state to institute a criminal proceeding, in the name of the United States, to enforce the anti-trust laws. 51 Cong. Rec. 14519, 14527 (1914); see **Georgia v. Evans**, 316 U. S. 159, 162 n. 1 (1942). It may be that some Congressmen would have thought that a judgment in such a case should be admissible as prima facie evidence in a treble-damage suit. At the same time, it is easy to see why Congress would be reluctant to permit the statute of limitations to be tolled at the whim of any state attorney general, and carefully limited the proceedings which would toll the statute to those "instituted by the United States."

3) **The Reported Cases Have Uniformly Refused to Admit FTC Orders as "Prima Facie Evidence," and the Antitrust Bar Has Agreed That Such Orders Are Not Admissible.**

Although § 5 has been on the statute books for 50 years, research has disclosed not a single case in which an FTC order has been admitted in evidence under § 5. In fact, until the district court decision in this case, no court had

ever in any way applied § 5 to FTC orders and proceedings. That unprecedented ruling has been emphatically rejected by three other district courts and the Eighth Circuit Court of Appeals:

In Highland Supply Corp. v. Reynolds Metals Co., 327 F. 2d 725 (8th Cir. 1964), all of the acts originally complained of occurred from six to seven years prior to the filing of the complaint, and the defendant moved to dismiss under the four-year statute of limitations, 15 U. S. C., § 15b. Plaintiff alleged that an intervening FTC proceeding, which was appealed to the court of appeals by defendant, tolled the statute under 15 U. S. C., § 16. Defendant also moved to strike all references to the FTC order and proceedings, while plaintiff claimed that the order would be admissible as *prima facie* evidence. The district court carefully considered and rejected the 3M district court opinion and unequivocally held that § 5 had no applicability to FTC orders or proceedings:

> "[I]n our view 'civil or criminal proceeding' plainly means a judicial proceeding and not an administrative proceeding. . . . Congress by its language has permitted the tolling of the statute only for a civil or criminal proceeding instituted by the United States. . . . We, therefore, hold that the statute of limitations has not been tolled. . . . [W]e conclude that neither the FTC order nor the Court of Appeals affirmance would be admissible in this private treble damage action." 221 F. Supp. 15, 17-18 (E. D. Mo. 1963).

The Eighth Circuit, although remanding the case to allow the plaintiff an opportunity to amend, nevertheless agreed completely with the district court that § 5 does not apply to FTC orders and proceedings:

> "In the light of controlling authority, we can find no ambiguity in the terms 'civil or criminal proceed-

> ings' as used in that section of the Clayton Act. . . . Since Section 5 of the Clayton Act has 'no application to an order . . . of the Federal Trade Commission' . . . we hold that any reference made to the F.T.C. proceedings in the instant complaint was insufficient to toll the statute of limitation as provided in that Act, . . ." 327 F. 2d at 730-31.

The United States District Court for Maine has written a comprehensive, scholarly analysis of the entire question, concluding that § 5 has no applicability to FTC orders or proceedings:

> "The precise question for decision is whether, by the use of the phrase 'any civil or criminal proceeding * * * instituted by the United States to prevent, restrain, or punish violations of * * * the antitrust laws' in Section 5 (b) of the Clayton Act, Congress intended to include a proceeding initiated by the Federal Trade Commission. In the view of this Court, the language used by Congress, taken in its ordinary and natural sense, argues against such a conclusion, and a consideration of the policy intended to be served by the statute, its legislative history, and other usual aids to statutory construction all support the view that Congress did not use the words in the sense for which plaintiff contends." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 970 (D. Maine 1963).

It is respectfully submitted that by all standards of logical and legal analysis, and by all canons of statutory construction, the Maine opinion is a superior and more persuasive study of the issues in this case than the opinion of the court below.

The fourth federal court to reject the novel **3M** decision was the United States District Court for the Eastern Dis-

trict of Tennessee in **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712, 713 (E. D. Tenn. 1963):

> "Judge Augelli clearly assimulates [sic] a proceeding by the Federal Trade Commission to one 'instituted by the United States.' In the judgment of this Court, Judge Augelli's opinion is doubtful authority for this view, because of its reliance upon the case of Brunswick-Balke-Collender Co. v. American Bowling and Billiard Corp., 150 F. 2d 69 (C. A. 2)."

The court below criticized all four federal courts which disagreed with it:

> "[T]hose courts clearly **overlooked the affirmative statutory distinction** between FTC proceedings under the FTC Act and under the Clayton Act and that distinction's vital effect upon Section 4 and Section 5 of the Clayton Act; otherwise they could not have **reasonably** adopted the **obsolete Proper rule.** To do so at this stage is to consider the present question in a vacuum and simply forget all about the present governing statutory formula for the enforcement of the Clayton Act and the increased powers that have come to the FTC." R. 91.

This is basically two criticisms in one. These courts are charged with having "clearly overlooked the affirmative statutory distinction between FTC proceedings under the FTC Act and under the Clayton Act." This "distinction," which appears to have originated with the appellate opinion in this case, has been discussed earlier. If such a "distinction" exists, and if it has any relevance to this case (see pp. 11-13, *supra*), it existed in 1914 just as much as it does today. Yet the court below concedes that, in 1914, an FTC proceeding was not a "suit or proceeding in equity" and an FTC order was not admissible in evidence. The court failed to point to anything

since 1914 which altered or enlarged this "distinction." Thus, if as the court below concedes, its illusory, "distinction" did not make § 5 applicable to FTC proceedings in 1914, it is difficult to see how it could have any greater effect today.

The second criticism relates to the "obsolete Proper rule" and "forget[ting] all about . . . the increased powers that have come to the FTC." The reference to the "obsolete Proper rule" is to the classic case of **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923), where the court said:

> "An analysis of section 5 . . . discloses that there are six requirements contained in said section 5 with which compliance must be had in order to make the proceedings competent evidence in this suit: (1) The judgment or decree must be final. (2) It must have been rendered in a criminal prosecution or in a suit or proceeding in equity. (3) The prosecution, suit, or proceeding must have been brought by or on behalf of the United States. (4) It must have been instituted under the anti-trust laws. (5) It must be to the effect that a defendant has violated those laws. (6) It shall be prima facie evidence against that defendant.
>
> "Considering these in the order set forth, the court is constrained to hold: (1) That the proceedings before the Federal Trade Commission did not result in a final judgment or decree. (2) There is grave doubt whether the proceedings before the Commission is a proceeding in equity. The Commission itself is rather an investigating body than a judicial tribunal, and its order has no binding effect until it has received the judicial sanction of the Circuit Court of Appeals. (3) Strictly speaking, it would seem that the proceeding is not brought by or on behalf of the United States, inas-

much as it is instituted by the Federal Trade Commission, although it may well be held that this body as a creature of the government may be said to be acting on behalf thereof. (4) The suit or proceeding must be brought under the anti-trust laws. Neither the Federal Trade Commission Act in its references to anti-trust acts, nor the Clayton Act in its references to anti-trust laws, includes the Federal Trade Commission Act in such a classification. Therefore the proceeding before the Federal Trade Commission is not such a proceeding as is held by section 5 of the Federal Trade Commission Act to be competent evidence, as asserted by plaintiff. (5) The discussion of the fourth requirement is applicable to the fifth. (6) The Act permits the proceedings before the Commission to be received as prima facie evidence against such defendant. In the case at bar there are various other defendants." 295 Fed. at 731-32.

Of the **Proper** case, the court below said:

"There are no findings in Proper contrary to our conception of the law as it stood in 1923. The court in Proper dealt with a 1923 FTC proceeding under the FTC Act. We have before us a proceeding under the Clayton Act brought by an expanded 1960 FTC." R. 85.

Thus, the court below agrees that, at least until 1959, an FTC proceeding was not a "suit or proceeding in equity," and bases its decision entirely on "an expanded 1960 FTC."

It is unfair to charge the various federal courts with simply "adopt[ing]" an "obsolete" rule. In the first place, it is abundantly clear from a reading of at least three of the opinions (Eighth Circuit, Missouri, and Maine), particularly that of **Farmington Dowel**, that those

courts engaged in a detailed analysis of the precise statutory language, and reached their own independent conclusions as to the scope of § 5. Secondly, the lower court's only disagreement with **Proper** is based on the 1959 Finality Act. The court below referred to the "increased powers that have come to the FTC" (R. 91) and to "an expanded 1960 FTC" (R. 85). As will be seen at pp. 64-68, *infra*, Congress, in 1959, had absolutely no intention of bringing FTC orders or proceedings within the scope of § 5 of the Clayton Act. Certainly, the Finality Act did not result in any "increased powers" for, nor expansion of, the FTC. Further, contrary to the lower court's apparent understanding, the question of the effect of the 1959 "Finality Act" **was** presented to the courts in the **Highland Supply** and **Farmington Dowel** cases, and the argument was apparently considered too frivolous to justify comment in the opinions. At the very least, it is unwarranted to say that these courts could not "reasonably" have differed with the lower court's construction of the effect of the 1959 Act upon the scope of § 5.

The lower court totally ignored all other authorities. For example, in **United States v. United Shoe Mach. Corp.**, 89 F. Supp. 349, 356 (D. Mass. 1950), Judge Wyzanski, "an eminent authority on the antitrust laws,"[5] ruled:

> "The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as prima facie evidence in a private treble damage suit."

Judge Wyzanski regarded the matter as too plain to require the citation of authority.

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[5] *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 223 F. Supp. 967, 971 (D. Maine 1963).

See also **International Tag & Salesbook Co. v. American Salesbook Co.**, 6 F. R. D. 45, 48 (S. D. N. Y. 1943) ("Assuming that a proceeding before the Federal Trade Commission comes within the purview of this section [Section 5 (a)], **which I doubt**, . . ."); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, Trade Reg. Rep. (1958 Trade Cas.), ¶ 69132 (N. Y. Sup. Ct. 1958).

As recognized by the court in the **Farmington Dowel** case: "The commentators, apparently without exception, concur with Judge Wyzanski's conclusion." 223 F. Supp. at 974. These authorities presumably represent the consensus of the antitrust bar:

"Note also that an order or finding of an administrative agency such as the Federal Trade Commission cannot be used as evidence in a private suit for treble damages." Kronstein & Miller, Regulation of Trade 1106 (1953). "This section [5] has no application to an order or decree of the Federal Trade Commission." 2 Toulmin, Anti-Trust Laws 118 (1949). "[A]djudications in Federal Trade Commission proceedings are not prima facie evidence in private antitrust suits under Section 5 (a) of the Clayton Act; . . ." 1961 CCH Trade Reg. Rep., ¶ 9157. The *prima facie* evidence clause of § 5 "has no application to an order or decree of the Federal Trade Commission." Thornton, Combinations in Restraint of Trade 908 n. 2 (1928). Accord: I Hoffmann, Antitrust Law and Techniques 23, 23 n. 34 (1963); Beer, Federal Trade Law and Practice 429, 429 n. 53 (1942); Butler 45-47; McDonald 62; Kintner, **The Trade Court Proposal: An Examination of Some Possible Defects**, 44 A. B. A. J. 441, 444 n. 29 (1958); Matteoni, **Antitrust Ambiguity Under Section 5 (a) of the Clayton Act**, 11 U. C. L. A. L. Rev. 792, 795 (1964).

The only case cited by the court below as raising a contrary inference was flatly repudiated by the same court on rehearing. In **Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp.**, 150 F. 2d 69, 74 (2d

Cir.), **cert. denied**, 326 U. S. 757 (1945), a majority of the court initially decided that:

> "Before the Act was amended in 1938, a cease and desist order of the Federal Trade Commission did not become operative except after the entry of an enforcing decree by the Court of Appeals; the Commission's order could not then be regarded as a 'judgment' or 'decree' within the meaning of § 5. But now that, pursuant to the 1938 amendment, a Commission order becomes final, unless judicial review is sought within a permitted period, such an order, if not reviewed, must be considered a 'judgment' or 'decree' within § 5. Here no review was sought." 150 F. 2d at 72.

Notably, the majority failed to mention the other requirements of § 5, namely, that such "judgment" or "decree" be rendered in a "suit or proceeding in equity" which has been "brought by or on behalf of the United States." On rehearing, the majority reversed itself and excluded the decree, explaining:

> "In our [first] opinion, we treated the 1938 amendment as to the effectiveness of the Commission's orders as an amendment of the Clayton Act, . . . In fact, it merely amended the Federal Trade Commission Act. . . . We must, therefore, hold that the order of the Federal Trade Commission was correctly excluded. Cf. Proper v. John Bene & Sons, . . ." 150 F. 2d at 74.

In a footnote, the court announced: "That portion of our previous opinion as to violations of the Clayton Act is accordingly **withdrawn**." 150 F. 2d at 74 n. 1. Thus, the Second Circuit squarely rejected its earlier opinion.

Nevertheless, the court below relied exclusively on this **withdrawn** opinion for authority directly in point, stating:

> "There the Court held [!] that an FTC proceeding was a 'final judgment or decree' rendered in a 'suit or proceeding in equity brought by or on behalf of the United States' . . ." (R. 85).

The original dissenting opinion of Judge Evans might now be considered in the nature of a concurring opinion, since the majority eventually reached the same result. Because it represents the leading appellate pronouncement on the admissibility of an FTC order, assuming *arguendo* that the order is a "final" order, it is worthy of examination:

> "I believe the District Court properly excluded the order of the Federal Trade Commission. It does not fall within that portion of Section 5 of the Clayton Act quoted in the majority opinion. It seems to me the order of the Commission, final though it may be, is not the kind of an order described by Section 5. It is not a 'final judgment or decree rendered in any criminal prosecution.' Neither is it a 'final judgment . . . in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws.' Proper v. John Bene & Sons, D. C., 295 F. 729; Federal Trade Law and Practice, Henry Ward Beer, page 429, footnote 53.
>
> "As stated by Mr. Beer, 'Under the Wheeler-Lea Amendments to the F. T. C. Act, Commission orders may become final. . . . However the present finality of such orders would not have affected the decision in the Bene case because of the other criteria mentioned by the court.'
>
> "Aside from these authorities it seems tolerably plain to me that the quoted portion of Section 5 of the Clayton Act does not apply to an order of the Federal Trade Commission." 150 F. 2d at 73.

Of this opinion it has been said: "The viewpoint of Judge Evans seems beyond challenge." Butler 45.

It is quite true, as the lower court has charged, that the other four federal courts have "summarily rejected the [original] Brunswick-Balke-Collender opinion" (R. 90-91). However, it is neither true nor fair to say that all of these courts did so because "the status of the Brunswick-Balke opinion of Judge Frank was fundamentally misunderstood" (R. 91). Quite the contrary, the court in **Farmington Dowel** understood quite thoroughly that Judge Frank's opinion "was not reversed." In fact, the **Farmington Dowel** court recognized, as the court below apparently did not, that Judge Frank's opinion not only was "not usable," but was "subsequently **withdrawn.**" **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 974 (D. Maine 1963).

The decision below is probably the only court of appeals' decision in history in which the only opinion which the court relied on as being directly in point had been explicitly "**withdrawn.**" 150 F. 2d at 74 n.1.

Further, the court below failed even to mention Judge Evans' dissent to the original opinion, and was apparently unaware that the Second Circuit has subsequently accepted Judge Evans' opinion as a correct statement of the law. In **Wright v. Carter Prods., Inc.**, 244 F. 2d 53 (2d Cir. 1957), a tort action for damages allegedly caused by defendant's deodorant, plaintiffs "attempted unsuccessfully to introduce findings of the Federal Trade Commission, affirmed by a court of appeals prior to Mrs. Wright's purchase in 1951, to the effect that the use of Arrid will cause dermatitis in some people." 244 F. 2d at 56. The court rejected this proof because of its non-judicial nature, citing with approval both the **Proper** case and the **Brunswick** opinion **on rehearing**:

> "Since this finding was made in a controversy between different parties and at **an administrative hearing conducted according to its own rules of evidence**, it is admissible in the suit at bar only on the

issue of notice and not as evidence of the fact of Arrid's propensities. Cf. Brunswick-Balke-Collender Co. v. American Bowling & Billiard Corp., 2 Cir., 1949, 150 F. 2d 69, 74; Proper v. John Bene & Sons, D. C. N. Y. 1923, 295 F. 729, 731-32." 244 F. 2d at 59 n. 4.

The spot citation to **Brunswick** is to the **second Brunswick** opinion. Since the **Carter Products** order had been affirmed by a court of appeals, the Second Circuit could not have been citing either the second **Brunswick** opinion, or **Proper**, on the question of finality. Thus, the Second Circuit has squarely repudiated the original, withdrawn opinion in **Brunswick**; has reaffirmed the authority of **Proper**; and has held that both cases stand for the proposition that "an administrative hearing conducted according to its own rules of evidence" cannot result in an order which has any proper place in judicial proceedings.

4. Legislative History Demonstrates That Congress in 1914 Did Not Intend FTC Orders to Be Used as "Prima Facie Evidence" in Treble-Damage Suits.

It is axiomatic that, where the words of a statute are unambiguous, it is unnecessary to resort to legislative history to determine the meaning of the statute. Conversely, if the language is ambiguous, it is proper to utilize legislative history as an aid to construction.

The following courts have specifically ruled that the language of § 5 clearly and unambiguously **excludes** FTC proceedings and orders. The Eighth Circuit (**Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964)); the Eastern District of Missouri (**Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15 (E. D. Mo. 1963)); the Eastern District of Tennessee (**Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712 (E. D. Tenn. 1963)); see **United States v. United**

Shoe Mach. Corp., 89 F. Supp. 349, 356 (D. Mass. 1950); **Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923); see also **International Tag & Salesbook Co. v. American Salesbook Co.**, 6 F. R. D. 45, 48 (S. D. N. Y. 1943); **Wendel Shoes, Inc. v. Shoenterprise Corp.**, TRADE REG. REP. (1958 Trade Cas.) ¶ 69132 (N. Y. Sup. Ct. 1958). The District Court of Maine apparently agreed that the language unambiguously excluded FTC proceedings, but went further and supported its conclusion with legislative history (**Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 970 (D. Maine 1963) ("In the view of this Court, the language used by Congress, taken in its ordinary and natural sense, argues against [inclusion of FTC proceedings] . . . .")).

The district court in this case rejected the unanimous rulings of the federal courts in holding that the language of § 5 did not clearly **exclude** FTC proceedings, but was compelled to acknowledge that § 5 did not unambiguously **include** FTC proceedings, and thus turned to legislative history to interpret the language. However, no relevant legislative history was cited to the district court.

The opinion of the court below is unclear on this point. Legislative history is referred to a number of times. Apparently, the court felt that the present language is ambiguous, for the court turned to legislative history. However, the court also appears to have held that the **original** language clearly and unambiguously **excluded** FTC proceedings.

In sum, no court has ever held that either the original or the present language of § 5 clearly **included** FTC orders or proceedings. Further, every court which has considered the original language of § 5 has held that it clearly **excluded** FTC orders and proceedings. Finally, every court (except the lower courts in this case) which have answered

the question have held that the **present** language clearly **excludes** FTC orders and proceedings.

Extensive 1914 legislative history was presented to the Eighth Circuit to demonstrate that Congress had no intent to include FTC orders and proceedings within the scope of § 5. Since the court below clearly has agreed on this point, only a small portion of this history will be briefed herein. However, voluminous evidence of the original congressional intent has been deposited with the Clerk of this Court, marked Appendices A through E and I through K.

Both the FTC Act and the Clayton Act were considered in the same session of Congress, in 1914, and numerous cross-references appear throughout the debates. In the extensive debates of the Clayton Act concerning both § 5 (a) (denominated Section 6 in the draft under debate) and the FTC Act, "there is **not a single suggestion** that Section 5 might be applicable in the case of a Federal Trade Commission proceeding." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963). The debates emphatically negate any possibility that the absence of such a suggestion was a mere oversight.

> "The **overwhelming impression** one forms after reading the legislative history of the original Clayton Act is that none of the members of Congress in 1914 contemplated that Federal Trade Commission proceedings were within the purview of Section 5. . . . [T]he fact that the relevant legislative history is replete with references to judicial proceedings, and contains no mention of Commission proceedings, is a persuasive indication that there was **no intention** that the latter should generate Section 5 benefits." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963).

The floor debates on the FTC Act itself dispose of any suggestion that Congress wanted the results of Commission proceedings to be any kind of evidence, much less *prima facie* evidence:

> "Mr. Sutherland: . . . . So far as the findings of the commission are concerned, I do not think they ought to be evidence anywhere.
>
> "Mr. Crawford: I do not either.
>
> "Mr. Sutherland: I doubt very much whether we could make them evidence. . . . ." 51 **Cong. Rec.** 12789-90 (1914).

While the committee reports on the Clayton Act (Appendices I, J and K) are devoid of relevant material except for general reiterations of the language of the statute, the debates on the floor of each house contain abundant material affirmatively demonstrating the congressional understanding that § 5 (then 6) was not to apply to FTC proceedings.

1. Many statements made on the floor incontrovertibly demonstrate that all the Congressmen understood that a "final judgment or decree . . . in a suit or proceeding in equity" did not include an FTC order. For example, the spokesman for the Judiciary Committee, which had reported the bill, and the leader of the fight for its passage was Senator Walsh, who also led the unsuccessful fight to give the decree **conclusive** rather than *prima facie* effect. In arguing that his proposal would not violate the Constitution, he emphasized that § 5 did not apply to administrative orders, but only to judgments or decrees of the courts:

> "I want to say just a word with reference to the authorities to which the attention of the Senate has been invited . . . Nobody questions them. They all lay down the rule that in an action brought against

an individual who has never theretofore **had his day in court** you can not make a certificate or a recital or an **order of an administrative board** or anything of that kind conclusive against him. You may make it prima facie evidence.

". . . [T]he principle is general that whenever the law requires a certain document to be filed containing certain recitals that document becomes prima facie evidence of the truth of the recitals therein, and you can not make it conclusive. **That is quite a different thing. Here the party has had its day in court.** He has tried every issue, and it is simply a question, now that he has had it tried, whether he may insist upon a **second trial.**" 51 **Cong. Rec.** 13856-57 (1914).

(All quotations of debate herein are from volume 51; hereafter, they will be referred to by page number only.) See also Senator Walsh's argument at 13851, quoted more fully in Appendix A: The defendant "has had an opportunity to try out before a **court**, with all the **forms of the law**, every question involved in the lawsuit." Could there be a clearer statement that § 5 did not apply to administrative proceedings, or one from a more authoritative source? The senator's entire argument was bottomed on the very fact that administrative orders would not be admissible in a treble-damage suit.

On the other side of the fence, there were those who thought a judgment or decree for a defendant should be equally binding on a treble-damage plaintiff. In opposing this idea (originally in the House bill), Senator White argued:

"Then Mr. President, as has been said, it is burdensome enough to require parties to the litigation themselves to be bound by the **findings of a court or jury** in a particular case. So many things that we can not at the time possibly foresee influence such

decisions. The way in which the evidence is produced may have its effect upon a **jury or a court.**

"The manner in which the case is handled by the lawyers employed may determine in the mind of a **jury or a court** what the verdict or the judgment shall be, and yet, Mr. President, those things should probably not have been controlling influences in the conclusions reached." 13900.

2. In addition to the above specific statements: "Excerpts from the committee reports and Congressional debates are distinctly judicial in tone." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963). Only a few exemplary statements are included here, but many others will be found in Appendix A to this brief, and in the following pages of this brief.

When the final conference bill was returned to the House for approval, Representative Floyd, the co-author of the bill, who led the fight in the House for its passage, told the House:

"Under section 5 of the bill any private litigant injured by the unlawful acts of any corporation where the Government of the United States has proceeded against such corporation and obtained a judgment, either in a **court of law or equity**, is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. That is a new remedy never given to litigants before. . . . That is a new remedy and a most efficient remedy. The Government of the United States, acting in behalf of all of its citizens, prosecutes a trust, convicts it either **in a criminal court or a civil court**, and the private litigant, injured by the unlawful acts of such trusts, has nothing to do in order to recover the three-fold damages ex-

> cept to prove the amount of damages and that the injury was done by this trust or corporation. It shifts the burden of proof and gives the litigant a great advantage." 16319.

Again, Sen. Cummins said: "But when the suit is brought, then the **judgment** or **decree** of the **court** in the suit that has been brought by the Government would be prima facie evidence of violation of the antitrust law, . . ." 13850.

Lest it be thought that the term "court" was intended to embrace the FTC, note the following by Sen. Reed: "The fact is, as everyone knows, that the Trade Commission could not deal with criminal penalties because **it is not a court.**" 16154.

Another colloquy, this time in the House, is particularly significant:

> "Mr. McKenzie: If this section is left in the bill do you not feel and believe that this decree that is mentioned in this section should be the decree of the court of last resort—the Supreme Court of the land?
>
> "Mr. Volstead: No.
>
> ". . .
>
> "Mr. McKenzie: You think it would be good policy to leave a matter of such great importnace in the hands of an **inferior court**?
>
> "Mr. Volstead: Yes. . . ." 9079.

The term "inferior court" is a particular term of art found in Article III of the United States Constitution and is limited to Article III courts. See, *e. g.*, Ex parte **Bakelite Corp.**, 279 U. S. 438 (1929). Certainly, the FTC is not an Article III court.

The illustrations are legion. The overall impact of the debates on the reader is that this Congress had not the slightest intention of applying § 5 to administrative pro-

ceedings, and that these senators and representatives were quite confident that they had written § 5 in such a way as to limit it to strictly judicial proceedings. Many of these men were lawyers with years of experience. They were dealing with terms of art carefully and conscientiously. It should not lightly be said that they abused their tools.

> "Congress is, after all, not a body of laymen unfamiliar with the common places of our law. . . . [T]he Congress is predominately a lawyers' body. We attribute 'to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction . . . .'"

between judicial and non-judicial proceedings. **Callanan v. United States**, 364 U. S. 587, 594 (1961).

3. As previously noted, the House bill made a "final judgment or decree" in a "suit or proceeding in equity" **conclusive** evidence against a treble-damage defendant. Many representatives argued that this provision would deny the constitutional right of trial by jury. Both the challenges to and the defenses of this provision repeatedly emphasized that the admissible decree would be a decree of a traditional **court of equity**:

> "Mr. Scott: Mr. Chairman, I ask the gentleman whether in the case of a suit brought at law against a corporation for damages under the antitrust law, as it exists today, such defendant corporation would have the constitutional right to demand a jury trial in the law action?
>
> "Mr. Volstead: Certainly, it would.
>
> "Mr. Scott: Then how can we, by legislation, make a **decree in equity** conclusive evidence against that corporation?
>
> "Mr. Volstead: I do not think we can.
>
> "Mr. Scott: Does not the gentleman's amendment seek to do that very thing?

"Mr. Volstead: I do not think so. My amendment seeks to avoid making a judgment conclusive against a **private party**.

"Mr. Scott: But as against a corporation. Having tried the case before a **court in equity**, it is deprived of the right to jury trial in the law action for damages which the Constitution guarantees. The gentleman has substituted a **court of equity** for the constitutional jury." 9488.

(Further quotations on this point appear in Appendix B.)

Nowhere is it even suggested that defendants would be bound by an FTC order. How much louder the cries of the opponents of "conclusiveness" would have been had it even been suspected that five commissioners might be substituted for twelve jurors, and that the loose procedures of an administrative tribunal might be substituted for judicial procedures.

4. As originally presented to the House, § 5 (then 6) also made a "judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" conclusive against any prospective treble-damage plaintiff. Opponents of this reciprocity clause vigorously challenged the constitutionality of binding a party who has never had his "day in court." Time and again, the debates made it clear that the proceeding contemplated was an action brought for the United States by the **Attorney General**, not an administrative proceeding. On the practical side, the measure's opponents raised the specter of a collusive suit resulting in an absolution of a trust which would bind the world:

"Mr. Sisson: . . . [D]oes the gentleman believe that his rights in the court should be determined upon the questions raised by the **Attorney General of the United States**?

"Mr. Prouty: Why, certainly not; the Constitution expressly prohibits it. In other words, the **Attorney General** could go in and prevent my having a trial before a jury.

"Mr. Sisson: That is the point I had in mind.

"Mr. Prouty: By instituting a proceeding in equity and having the case tried.

"Mr. Sisson: That is the point I had in mind, that the **Attorney General**, if he was disposed to do so—we would not charge that of any particular **Attorney General**—might cook up a case which would directly defeat the rights of every individual if he had been injured." 9492.

Defenders of the proposition countered:

"Mr. Cullop: My question is this: Supposing a collusive suit was brought and the defendant won on the issue, then is every outsider barred from any further suit? According to this language he is.

"Mr. Floyd of Arkansas . . .

". . . My answer to that proposition is that if the time ever comes in this Government when any **Attorney General** will enter into collusive suits with corporations and combinations engaged in unlawful acts, it will be an evil day for our Republic, a day when every statute will become useless and justice will become a mockery." 9489-90.

(Additional excerpts from the debates are set forth in Appendix C).

Throughout the debates there is no hint that an absent party might be bound by the FTC (or, for that matter, the Interstate Commerce Commission or the Federal Reserve Board—see 15 U. S. C., § 21). Those who feared that the trusts might "get to" the Attorney General of the United States would surely have been far more exercised if it had been proposed that collusive actions by the new agency could foreclose private litigants.

In fact, several senators already feared that the commission would become the tool of trusts and monopolies:

> "What are those who are violating the law getting under this change of program? . . . Fourth, they secure a commission whose membership merely they have to control in order to control the situation." 14262 (remarks of Sen. Reed.) (Further excerpts appear in Appendix C.)

Is it conceivable that great lawyers such as these, fearful for the independence of the Trade Commission the Senate had just agreed to create, would have kept silent upon a provision giving the commissioners power to estop forever all treble-damage plaintiffs from suing a particular trust or monopoly? How much more vociferous the protests against reciprocal conclusiveness would have been had it been contemplated that § 5 apply to the FTC.

5. Furthermore, an amendment was in fact offered in the Senate which would—arguably—have resulted in bringing administrative proceedings within the scope of the phrase "suit or proceeding." The amendment met with opposition and was withdrawn under fire.

The House bill dealt only with a "suit or proceeding in equity," and did not apply to criminal proceedings. After the bill reached the Senate, Sen. Bryan moved to strike out the words "in equity," so the provision would read simply "any suit or proceeding." As observed by Sen. Reed, "That would cover any kind of proceeding." Sen. Culberson proposed a substitute adding the phrase "criminal prosecution or," and retaining the phrase "in equity." Significantly, Sen. Bryan withdrew his broader proposal and accepted Sen. Culberson's limited substitute. 13897-98. (The debate on this amendment is set out in Appendix D.)

6. The debates over the "lack of teeth" in FTC proceedings emphasize that there was no purpose to admit the results of such proceedings in treble-damage suits.

The House originally passed the Clayton Act with four substantive sections, each having a criminal penalty attached. All of the criminal penalties were removed in the Senate or in conference. Sen. Reed of Missouri, leading the opposition to the bill, charged repeatedly that the Clayton Act had been stripped of all force and effectiveness:

> "We end by providing a smooth and easy road which may be traveled through the years, until finally a commission shall issue an innocuous nonenforceable decree, a decree that can be vitalized only by being affirmed by a court. At the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail, and **we permit the culprit to preserve his swag!**" 15867.

Had it been available, the obvious answer would have been that the bill does have teeth, and the culprit will not be allowed to preserve his swag, for the Commission's order will be admissible *prima facie* evidence against him, and private claimants will be able to reclaim this swag three times over. Neither this, nor any other answer challenging the accuracy of Sen. Reed's statement, was heard on the Senate floor, although his complaint was echoed repeatedly in the debates. (Excerpts of the same import are set forth in Appendix E.) Significantly, this complaint was voiced emphatically by Sen. Borah, who charged that the act told monopolists to "Keep the ill-gotten gains that you have made, . . ." 16044. (Cited fully in Appendix E.) Elsewhere in the debates, Sen. Borah made it clear that he keenly desired any provision which would ease the problems of the private treble-damage plaintiff (15950—see Appendix E), and further

that he considered private suits "the most effectual means of enforcing the Sherman antitrust law, . . ." (16046—see Appendix E). Clearly, Sen. Borah understood that the Clayton Act would not give treble-damage claimants the benefit of FTC orders.

In the House, Rep. Nelson charged:

> "Finally, the penalty is cut out; they can do all these things, and the Trade Commission can only say 'You must not do it any more.' Then there is the long delay in an appeal to the courts; and they go through the courts, and then what? There may be an injunction issued, but **they have got away with the loot with impunity.**" 16325.

(Numerous statements of like import are collected in Appendix E.) In rebuttal, Rep. Webb, Committee spokesman, pointed out various "teeth" in the bill, including §§ 5 and 11 (giving the FTC jurisdiction over violations of §§ 2, 3, 7, and 8), saying:

> "Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only suspend the statute of limitations if a **Government** suit is brought against a trust, but we **also** require the **Federal Trade Commission** to stop these practices and take those guilty of such practices into court.
>
> "But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:
>
> "'No **order of the commission** or board **or** the **judgment of the court to enforce the same** shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

"So you have three or four distinct remedies, all of which may be invoked at the same time." 16274.

Three things are noteworthy. First, Rep. Webb specifically distinguishes "Government" suits (used interchangeably with "United States" throughout the debates) from "Federal Trade Commission" action. Second, Rep. Webb specifically distinguishes between the "order" of the administrative agency and the "judgment" of a court; he and his colleagues fully understood the common meaning of these terms when they used them in § 5. Third, in reply to those who feared that assumption of jurisdiction by the FTC would exclude treble-damage actions, a specific rebuttal would have been that § 5 tolled the statute during FTC proceedings and made FTC orders *prima facie* evidence. Rep. Webb could not give this answer, for such was not the case.

In summary, it was clearly not the intent of Congress that § 5 apply to FTC orders. Any other conclusion would impugn the legal abilities of the members of Congress in 1914. As Thomas F. Butler, Jr., has said:

> "It seems inconceivable . . . that in 1914, when the Commission was established and when this expression was used in the enactment of the Clayton Act, any member of the Congress equated the administrative functions to be performed by the FTC with judicial proceedings. At that time, careful distinctions were preserved in federal courts between their jurisdiction in law actions and suits in equity, and it stands to reason that the expression 'suit or proceeding in equity' was used solely to distinguish between court actions, on the law or equity side of the court docket." Butler 46.

However, as noted previously, the court below attempted to circumvent the settled law of 49 years by suggesting

that, where the FTC sought enforcement, or the defendant sought review, in the court of appeals, the judgment of the court of appeals enforcing the FTC order was admissible even though the FTC order itself was not. The many logical, legal, and historical objections to this novel theory have already been set forth at pp. 16, 18-21, *supra*. Further analysis will show that the lower court's notion fares no better than the FTC order itself when faced with the gauntlet of the foregoing legislative history.

First, in the debates on the FTC Act itself, it was stated and repeated without contradiction that "the findings of the commission" ought not "to be evidence anywhere." 12789-90 (see p. 36, *supra*). The court of appeals makes no findings, and must accept those of the Commission if supported by "substantial evidence." 15 U. S. C. § 21 (c) (see p. 18, *supra*). Thus, whether or not the FTC order has been reviewed by the court of appeals, the findings are still "the findings of the commission" and ought not "to be evidence anywhere." Whether enforced or not, an order is still "an order of an administrative board," [13856-57; See **Chain Institute v. FTC**, 246 F. 2d 231, 239 (8th Cir.), **cert. denied**, 355 U. S. 895 (1957)—see pp. 16, 36-37, *supra*], which "is quite a different thing" from a "judgment or decree" within the meaning of § 5. 13856-57. It is certainly not "the findings of a court or jury." 13900—see p. 37, *supra*. Even where the order has been reviewed, the respondent has not "had an opportunity to try out before a court, with all the forms of the law, every question involved in the lawsuit." 13851—see p. 37, *supra*.

Second, in the debates on whether a "judgment or decree" in a "suit or proceeding in equity" should be conclusive evidence against a treble-damage defendant, it was repeatedly emphasized that the government suit would be a trial in a court of equity, not merely a review: "Having tried the case before a court in equity, it is de-

prived of the right to jury trial in the law action for damages which the Constitution guarantees. The gentleman has substituted a **court of equity** for the constitutional jury." 9488. It is quite clear that Congress contemplated only a suit **originating** in a court of equity: "the corporation is **brought into a court of equity** upon a **proper bill** and by a **proper service**, and with subject matter over which the court has jurisdiction, . . ." 9492. (Remarks of Rep. Scott.)

Third, in the debates on the constitutionality of making a "judgment or decree" conclusive against a treble-damage plaintiff, the fear was repeatedly expressed that an **Attorney General** might compromise away the rights of a treble-damage plaintiff: "[T]he **Attorney General**, if he was disposed to do so—we would not charge that of any particular **Attorney General**—might cook up a case which would directly defeat the rights of every individual if he had been injured." 9492. "Although the independents have never had their day in court, they are absolutely bound by any feeble compromise the **Attorney General** may make." 9169—see pp. 41-43, *supra*. Regardless of whether proceedings in the court of appeals were instituted as review proceedings by the defendant, or as enforcement proceedings by the FTC, they are obviously **not** brought by the **Attorney General**.

Finally, the debates over the lack of teeth in the Clayton Act demonstrate the inapplicability of § 5 to appellate proceedings just as well as they demonstrate its inapplicability to the FTC proceedings themselves. Opponents of the tooth-pulling charged repeatedly that the Clayton Act had been stripped of all force and effectiveness: "[W]e permit the culprit to preserve his swag." (15867); "[T]hey have got away with the loot with impunity" (16325). Had it been available, the simple, effective answer to these gibes would have been that FTC

orders would be *prima facie* evidence in treble-damage proceedings. This answer was not given, for the simple reason that it was not available. An almost equally effective answer would have been that a judgment of a court of appeals enforcing an FTC order would be admissible as *prima facie* evidence. This answer was not given either, and for the same, obvious reason—it simply was not true. Similarly, opponents of the final bill feared that assumption of jurisdiction by the FTC would exclude treble-damage actions. Again, a clear, simple answer would have been that, by the provisions of § 5, judicially enforced orders were admissible in treble-damage actions. This answer was not given. It could not have been. See 16274—see pp. 44-46, *supra*.

In sum, the court below has conceded that, under § 5 as originally passed, FTC orders were clearly excluded. Its attempt to circumvent this inevitable conclusion finds no support in the language of the statute, in case law, or in legislative history, and is plainly and simply illogical.

5. **The 1955 Amendment to the Clayton Act Made No Change in the Requisites for Admissibility.**

The only time that § 5 has been amended in any way since its passage was in 1955. The court below makes no claim that this amendment had any relevance to the case at bar, and, in fact, tacitly concedes that there has been no substantive change in § 5 since its inception (R. 81, 84-85). However, in order that this Court may fully understand the source of the present language of § 5, the following pages will briefly explain that language. More detailed coverage of the legislative history of the 1955 amendment is set forth in Appendices G, H, and L through S.

a) The term "Civil Proceeding" does not include FTC proceedings.

The only change in § 5 which could possibly have any bearing on the admissibility of an FTC order is the substitution of the phrase "civil or criminal proceeding" for the phrase "criminal prosecution or suit or proceeding in equity." The other prerequisites for admissibility—that it be a "judgment or decree" rendered in a proceeding "brought by or on behalf of the United States"—remain unchanged. As previously shown, an FTC order fails to meet these requirements. An FTC order is still not a "judgment or decree." An FTC proceeding is still not "brought by or on behalf of the United States." The fact that Congress failed to change these other requisites was conclusive proof to the court in **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973 (D. Maine 1963), that Congress intended no substantive change:

> "It also seems significant that Congress used the phrase 'judgment or decree' in the original Clayton Act, and that this language was left unchanged by the 1955 amendment. The Federal Trade Commission does not render a 'judgment or decree.' Its authority is limited to that of issuing a cease and desist 'order' to curb violations of the antitrust laws. . . . It seems reasonable to assume that if Congress had intended by the substitution of the words 'civil or criminal proceeding' in the 1955 amendment of the Clayton Act to include a Federal Trade Commission proceeding, it would have amended the phrase 'judgment or decree' to include an administrative 'order'."

However, even if these remaining prerequisites were satisfied, an FTC hearing is not a "civil or criminal proceeding."

Congress has specifically denoted hearings and investigations conducted by administrative bodies as "agency

proceeding[s]" in laying down the fundamental guideline for all such bodies—the Administrative Procedure Act. 5 U. S. C., § 1001(g). "[T]hat is their proper classification." Butler 46.

Further, Congress has used the term "civil proceedings" in other statutes where to interpret the term as including agency proceedings would lead to absurd results. For example, does 28 U. S. C., § 1337, in conferring on district courts "original jurisdiction of any civil action or proceeding arising under" the antitrust laws, thereby confer original jurisdiction of complaints filed by the FTC under § 11 of the Clayton Act? Apparently, Congress has never used the term "civil proceeding" to apply to an agency proceeding. Strong evidence should be required before it is found that Congress here departed from basic terminology it has itself laid down.

That an FTC proceeding is not a "civil proceeding" was quite clear to the court in **Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15, 17 (E. D. Mo. 1963):

> "[I]n our view 'civil or criminal proceeding' plainly means a judicial proceeding and not an administrative proceeding. Such is clear to us because the words 'civil or criminal' used to describe the proceeding further identifies and affirms the general understanding of 'proceeding' to mean the method of conducting business before a court."

Similarly, in **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963), the court found "no indication in the relevant legislative history that Congress intended any substantive change by the substitution of these words, . . ."

The court in **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712, 713 (E. D. Tenn. 1963), reached an identical conclusion: "[T]here is nothing in the

amended language which clearly broadens the Act to include proceedings by the Commission." **Accord, Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964). No court has ever held to the contrary.

b) **Legislative history clearly demonstrates that the 1955 legislation was not intended to effect any change in § 5 (a).**

The actual legislative history of the 1955 amendment goes back to 1949. Hearings were held by a Senate subcommittee in 1949, by a House subcommittee in 1950, and again by the House subcommittee in 1951. Reports were issued by the House subcommittee in 1950 and in 1955, and by the Senate Subcommittee in 1955. Debate was held on the floor of the House in 1950 and again in 1955. The bill which was finally passed remained the same basic bill throughout, although it carried different numbers and was redrafted by different authors. Some of its provisions varied, but the provision in question was the same throughout.

(i) Specific statements demonstrate that § 5 was unchanged except in certain specified particulars not relevant here.

First, Rep. Patman appeared before the House subcommittee in 1951 because he feared that some amendment had been made to § 5 which would remove the right of a private litigant to use a judgment obtained by the Government. Rep. Wilson assured him: "This doesn't change the present law." Rep. Keating, the author of the bill, then commented: "I think there is a slight change in existing law where it refers to the subsequent numbers. There has to be a change in phraseology in that because of what we have done in section 4. I believe that is the only change." **Hearings on H.R. 3408 Before the Sub-**

committee on Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., Part 3, 98-100. [Hereinafter cited as 1951 House Hearings.] (Relevant portions of this colloquy are set out in Appendix F.)

Second, on the floor of the House, Rep. Quigley stated:

> "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955).

Numerous analyses were presented to the committee in the course of the hearings, and these uniformly stated that no significant or substantive change was being made in the "prima facie evidence" provision. See *e. g.*, Statements of the Committee on Trade Regulation and Trademarks of the Association of the Bar of the City of New York in 1950 and 1951, and of Abram F. Myers, an attorney, quoted in part in Appendix F.

(ii) None of the numerous statements setting forth the purposes of the various bills included a purpose to amend § 5 to include FTC orders.

Time and again the committees, the individual members thereof, individual congressmen, the FTC, the Justice Department, and interested private parties set out specifically and numerically the objectives to be accomplished by the bill in its various versions. Not once was there the slightest suggestion of an intention to change the scope of § 5 to include administrative orders.

The most significant documents are the committee reports on the bills. H. R. Rep. No. 422, 84th Cong., 1st Sess. (1955), sets forth in detail every change which the bill

would achieve, but nowhere is there any suggestion of any change in the "prima facie evidence" provisions of § 5.

S. Rep. No. 619, 84th Cong., 1st Sess. (1955), lists as the bill's "Purpose":

> "The purpose of the proposed legislation is to amend the Clayton Act (38 Stat. 730) by (a) granting the United States the right to recover actual damages for injuries to its business or property by reason of violations of the antitrust laws, and (b), by establishing a uniform 4-year statute of limitations for antitrust damage suits brought by private parties or the United States." *Id.* at 1.

The only reference in this Report to amendment of the "prima facie evidence" clause of the Clayton Act is:

> "Section 2 of the bill amends section 5 (a) of the Clayton Act to provide that final judgments or decrees rendered in civil or criminal proceedings (with the exception of Government damage suits under the new section 4A) instituted by the United States under the antitrust laws shall be prima facie evidence against defendants in damage suits by the United States under proposed section 4A as well as in private damage suits." *Id.* at 2.

In other words, the only change was to give the United States the benefit of the section in its newly created single-damage remedy.

S. Rep. No. 619 also sets forth for the Senate a letter from the Attorney General, who stated the amendments sought as he saw them, and also mentioned no substantive change in the "prima facie evidence" clause. *Id.* at 7. Senator Johnston of Texas stated the purpose of the bill to the Senate by repeating the language of the committee report. 101 **Cong. Rec.** 9165 (1955).

If these committees of the Congress in fact intended to make any such drastic change in the settled law, unchal-

lenged in 41 years of administration, as bringing administrative orders within the ambit of the "prima facie evidence" clause of the Clayton Act, they were deliberately setting out to perpetrate a fraud upon their fellow Congressmen by concealing this purpose from them. Even upon the most unequivocal evidence, one supposes that this Court would hesitate to impute such a purpose to these committees.

The Senate debates and the House debates, insofar as here relevant, are quoted in full in Appendix R. Time and again in these debates, the purposes of the bill were set forth, and never was any such change as this suggested.

Thus, if the committee or any Congressman had any purpose to change the prerequisites for the application of the *prima facie* evidence provisions, such purpose was never disclosed to the Senate or House of Representatives.

The foregoing constitute all of the known legislative materials directly dealing with H. R. 4954, the 1955 amendment to the Clayton Act. One portion of the history of prior proposals is worthy of note here. In the hearings on these proposals, representatives of the FTC testified before the committees, and their testimony is highly significant.

In the 1949 Senate hearings, James W. Cassedy, Associate General Counsel of the FTC, testified: "Of course, the Federal Trade Commission is interested only in certain sections of the Clayton Act. We are interested in sections 2, 3, 7 and 8, I believe." Senator Donnell inquired, "Is any one of those sections affected by this bill?" Mr. Cassedy replied "No." **Hearing on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary,** 81st Cong., 1st Sess. 15 (1949). (Hereinafter cited as 1949 Senate Hearings.) (See App. L.)

In the 1950 House Hearings, a Report of the Federal Trade Commission per Lowell B. Mason, acting chairman,

was presented to the committ[illegible] This report explicitly stated the Chairman's understanding that only a criminal or injunction proceeding could give rise to the "prima facie effect":

> "The objectives of the legislation proposed by H. R. 7905 are (1) to permit the Government itself, as a private party, to sue for actual damages which it has suffered by virtue of violations of the antitrust laws; (2) to establish a Federal statute of limitations for all suits for triple and actual damages under the antitrust laws; and (3) to make a judgment or decree in favor of the United States in a criminal or injunction proceeding again [*sic*] a defendant for violation of the antitrust laws conclusive evidence against such defendant in a suit for triple damages by a private litigant."

The Report then repeats the language of the tolling provision without comment. Finally, it notes that:

> "Other provisions of the bill would accomplish its third objective by making a judgment or decree in favor of the Government in a criminal or injunction proceeding for violation of the antitrust laws, conclusive evidence (instead of prima facie evidence as provided in the present law) in a suit by a private litigant for triple damages based upon such violations."

Hearings on H.R. 7905 Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess. 66-67. (1950). (Hereinafter cited as 1950 House Hearings.) (See App. M.) See also a 1951 letter from Jas. M. Mead, Chairman, Federal Trade Commission, failing to indicate any such change, reproduced, in pertinent part, in Appendix F.

If any body or agency should have been aware of and interested in a proposal to make FTC orders "prima facie" evidence in treble-damage suits, it would be the

FTC. Yet, in three separate hearings, the FTC's official statement is totally devoid of any hint that such was either the purpose or effect of the language in question, or that such would be a desirable change.

Appendix F contains the relevant material from the earlier legislative history, including a committee "staff analysis" of an earlier version (the Denton bill) which Rep. Michener told the House "covers every phase of this bill." 96 **Cong. Rec.** 10442 (1950). This material clearly demonstrates that Congress had no intent or desire to change the prerequisites of admissibility in § 5.

(iii) Language used in the committee hearings indicates that the committee was considering § 5 in the context of judicial proceedings.

During the testimony of Professor Milton Handler of Columbia University, the following colloquy took place:

> "Mr. Wilson: Professor, I haven't read the legislative history, but as a general rule when these kinds of matters are involved, for absolute fairness wouldn't you ordinarily say that it would be better to have a rebuttable presumption, especially where **different courts and different juries** are involved, than to have a conclusive presumption, where no rebuttal testimony could be offered to offset or to change that **verdict?** Many times we disagree with the **verdict of a jury.** . . .
>
> . "That is our system. **Juries** disagree, as politicians disagree and as preachers disagree. Generally speaking, then, it is better to have a rebuttable presumption, because one might go haywire. . . ."

1950 House Hearings 11. Later, Rep. Michener stated that: "I don't like that 'conclusive' provision because you are frequently before different forums, dealing with **different juries,** in different localities." 1950 House Hearings 13. It would not seem that Reps. Wilson and Michener were speaking of FTC hearings. See App. M.

(iv) Arguments concerning the proposal to make a judgment or decree under §5 conclusive demonstrate that there was no intent to amend §5 to include FTC proceedings.

The bill considered in the 1950 House Hearings would have amended §5 to make judgments or decrees thereunder conclusive on treble-damage defendants. The statement of Rep. Wilson quoted in subsection (iii), *supra*, and of other representatives quoted in Appendix F, were made in opposition to this change. If these gentlemen were concerned because a jury might "go haywire," surely they would have expressed their feelings even more vehemently if there had been no jury at all, but merely a non-judicial (or "quasi-judicial") investigation before an administrative agency. The relation of this problem to the right of trial by jury was again called to the attention of the committee in the form of a Report by the Committee on the Clayton Act of the Section on Antitrust Law of the New York State Bar Association, on the Denton Bill:

> "It is submitted that giving a judgment in one action conclusive effect in another action, brought by a total stranger, is a practice not to be encouraged even upon the showing—not present here—of imperative necessity. It seems particularly inadvisable to permit any **judgment in an equity proceeding to deny the right of trial by jury** on the principal issue of a subsequent action at law." 1951 House Hearings 24. (See App. N.)

(v) During the 1950 House hearings (p. 46), Rep. Patman advocated that a judgment or decree be made binding on plaintiff, as well as defendants. In protesting this proposal, an expert witness, Walter Hamilton, made it clear that only judicial proceedings were contemplated:

> "I personally would not like to see the law written that if in a Government suit the defendants are found

innocent, that, therefore, binds me in a private suit. I have a great deal of respect for the people in the **Department of Justice**, but I think any one of them will tell me that there are degrees of ability in the **Department of Justice** and some people do better with a case than others." 1950 House Hearings 60. (See App. M.)

Significantly, no congressman or witness suggested any danger concerning the competency and honesty of FTC investigators, lawyers, hearing examiners, or the commissioners themselves.

(vi) The House committee was specifically informed that § 5 did not apply to FTC orders, and knowingly refrained from making or advocating such a change. During the 1951 House Hearings, the "chairman of the American Bar Association's standing committee on commerce" wrote the following letter to Congressman Celler:

"Dear Congressman Celler: . . .

"(1) I note that you have changed the language of section 5 of the Clayton Act, which now reads: 'A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States' to read: 'A final judgment or decree hereafter rendered in any civil or criminal proceeding * * * brought by or on behalf of the United States.' There is no objection to this change, **unless** by reason thereof it **could be contended** that a final order of the Federal Trade Commission or of a circuit court of appeals affirming a Trade Commission order is a judgment or decree rendered in a civil proceeding brought by or on behalf of the United States. **The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should**

not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court. It would be most unfortunate, it seems to me, to open up this question by changing the language which has already been definitely construed. A Federal Trade Commission action is not a suit or proceeding in equity. There may be some doubt, of course, whether a Federal Trade Commission proceeding can be said to have been brought by or on behalf of the United States. I respectfully suggest, however, that the committee should not inject an element of uncertainty as to the type of proceeding encompassed by section 5 and should either revert to the language of the original section or insert in the third line after (b)—an administrative proceeding or proceeding brought to review or modify an administrative order. . . .

Edward R. Johnston, Chairman."

1951 House Hearings 21-22. (See App. N.)

Apparently, the suggestion that the proposed language might introduce "an element of uncertainty" caught both the committee and its witnesses off their guard. For instance, when this suggestion was called to the attention of H. Graham Morison, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, he replied, "that is a point that is new to me," and declined to comment until he could study it. 1951 House Hearings 15-16. If Mr. Morison did later ponder the question, there is no record of it.

This suggestion was discussed by Mr. Kenneth C. Royall:

"Mr. Royall: . . .

"Now, gentlemen, there was one matter, one question, that was raised as to something about the FTC, by Mr. Shears. I think a careful reading of that comment will show that the suggestion of the American

Bar Association was to clarify the fact that FTC operations were not to be covered.

"Mr. Shears: That's correct.

"Mr. Royall: They were not to be covered in this statute, and I am sure that is a sound recommendation.

"Mr. Shears: What is your feeling with regard to the present language?

"Mr. Royall: I do not think they should be covered by this statute, because they are not of a judicial, strictly judicial, nature.

"Mr. Shears: Do you feel that the present language, without the suggested amendment of the American Bar Association, excludes the Federal Trade Commission or not?

"Mr. Royall: It never occurred to me that it included it. I must be frank; but, if there is any question about it, I think it ought to be excluded. However, we do not affirmatively suggest that, and we just ask that the committee give whatever consideration to the meaning of the language they think proper." 1951 House Hearings 58.

In summary, the chairman of an ABA committee expressed a fear that the proposed change in language might create uncertainty where none had existed before. The committee's questioning of witnesses Morison and Royall demonstrates that the Congressmen had never considered such an interpretation. Are we to suppose that, once such a possible uncertainty was called to their attention by one who opposed it, they formed a purpose to make a change in the law, and relied on the "uncertain" language to achieve the change? It would be more than disrespectful to presume that, having formed such an extraordinary purpose, these gentlemen set out to conceal that purpose from their colleagues in Congress, and withheld any reference thereto from the committee reports. The only reasonable conclusion available is that

the committee followed the recommendation of Mr. Royall and decided that the language of the bill was not ambiguous, in view of the fact that it had not disturbed any of the witnesses who appeared.

This incident has another significance which demonstrates conclusively that no change was intended. Mr. Johnston told the committee:

> "The courts have uniformly held in construing the present section 5 that a Federal Trade Commission proceeding was not within the purview of the act. Obviously, it should not be, since the Commission is not a court and proceedings before the Commission are not equivalent to a hearing in court." 1951 House Hearings 21.

Thus, if the committee was not already aware of the **Proper** case [**Proper v. John Bene & Sons**, 295 Fed. 729 (E. D. N. Y. 1923)], and of Judge Wyzanski's statement in **United States v. United Shoe Machinery Corp.**, 89 F. Supp. 349, 356 (D. Mass. 1950), this letter certainly called their attention to the existing state of the law. The leaders of the antitrust bar agreed that FTC orders were not admissible under § 5 (a). See secondary authorities cited at p. 29, *supra*.

> "The Congress may be presumed to have been conscious of the opinions in the two decisions mentioned above questioning the application of that phrase to FTC proceedings; and also to have known of the statement of Judge Wyzanski, a recognized authority on antitrust matters, . . ." Butler 47.

Nevertheless, the Senate and House Reports, and the debates in the House and Senate, are all completely devoid of any suggestion that any change in this established rule was intended. On the contrary, Congressman Celler, to whom the ABA letter was addressed, assured the House twice that this was "a relatively simple bill" [101 **Cong.**

Rec. 5129, 5130 (1955)], and then outlined its provisions, without any mention of a substantive change in the scope of § 5. Under the circumstances, it would be grossly unfair to Congressman Celler and his committee to impute to them a purpose to alter a 41-year-old proviso without calling it to the attention of their colleagues. Quite the contrary, the 1955 amendment seems to fall squarely within the line of authority holding that where Congress, with knowledge of extant judicial authority, reenacts a statute in substantially the same language, "without any change indicative of a disapproval of the prior construction . . . [such] reenactment operates as an implied legislative approval of the prior construction . . . ." **Johnson v. Manhattan Ry.**, 289 U. S. 479, 500 (1933). See also, *e. g.*, **NLRB v. Gullett Gin Co.**, 340 U. S. 361, 366 (1951). If Congress had desired to include FTC proceedings Congress could easily have said so. "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted . . ." **Maynard v. Elliott**, 283 U. S. 273, 277 (1931). To paraphrase the court in **Seaboard Air Line R. R. v. United States**, 83 F. Supp. 1012, 1015 (Ct. Cl. 1949), "it is to be presumed that Congress knew of the decision[s]" holding that § 5 did not apply to the FTC, and, "[i]f it did, its failure to state explicitly" that § 5 would apply to FTC orders and proceedings "is an indication that it did not intend it to so apply."

c) Congress Changed the Wording of § 5 to Conform to the Federal Rules of Civil Procedure.

If substitution of the phrase "civil or criminal proceeding" for "criminal prosecution or suit or proceeding in equity" was not intended to be a substantive change, why was it made? The answer is disarmingly simple—there is no longer any such action in the federal courts as a "suit or proceeding in equity." The Federal Rules of Civil Procedure, promulgated by this Court in 1938, abolished the distinction between law and equity. Rule 2

states: "There shall be one form of action to be known as 'civil action.'" **Fed. R. Civ. P.** 2. Since § 5 was being amended anyway, it was simply good draftsmanship to alter its language to conform to this change in federal procedure.

> "The reasonable conclusion is that the term 'civil or criminal proceeding' reflects merely the adoption of the phraseology of the present Federal Rules of Civil Procedure, in which the separate concept of a proceeding in equity under former Federal Equity Rules no longer exists: 'There shall be one form of action to be known as "civil action"' (Rule 2) and of the present Federal Rules of Criminal Procedure, which speak of 'criminal proceedings' (Rule 1)." **Butler** 46.

The District Court of Maine was thoroughly convinced of this explanation:

> "[T]he reasonable conclusion is that Congress merely changed the language to conform to that of the Federal Rules of Civil Procedure, which abolished the procedural distinctions between actions at law and suits or proceedings in equity, and the Federal Rules of Criminal Procedure, which speak of 'criminal proceedings.'" **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963).

6. The Finality Act of 1959 is totally irrelevant.

In the final analysis, the court below based its reversal of 49 years of settled law solely on an amendment to § 11 of the Clayton Act in 1959. Prior to that amendment, an FTC order under the Clayton Act did not become "final," and no longer subject to review, until either the commission sought enforcement or the respondent sought review in the court of appeals. Until the court of appeals had

ruled on such an application, the order was always subject to review. There was no time limit on either such application. The amendment to § 11 changed this procedure by making FTC Clayton Act orders "final" and enforceable **unless** the respondent sought review within a limited time. The amendment is totally irrelevant to the case at bar.

a) The only thing accomplished by the 1959 Finality Act is to make FTC orders automatically "final," thereby shifting the burden of seeking review from the FTC to the respondent. The only requirement of § 5 to which this change could conceivably relate is the requirement in § 5 (a) that the "judgment or decree" be final. Finality, of course, is in no way at issue here.

However, the court below asserts that somehow this amendment to § 11 of the Clayton Act "expanded" the FTC (R. 85), gave it "increased powers" (R. 91), and transformed the agency proceeding into "a 'proceeding in equity' and a 'civil proceeding' within the meaning of Section 5, . . ." (R. 85).

The Court below did not explain how or why this metamorphosis took place. The problem which Congress was seeking to remedy was that "the former § 11 procedures [for enforcement] were too cumbersome to assure effective enforcement of agency orders." **FTC v. Henry Broch & Co.**, 368 U. S. 360, 365 n. 6 (1962). The 1959 act had absolutely no effect on the nature of the FTC or its proceedings. This Court has specifically held that the FTC "has not been delegated the authority of a court of equity" **(FTC v. Eastman Kodak Co.**, 274 U. S. 619, 623 (1927)), and the lower court's blunt pronouncement to the contrary is embarrassingly barren of any authority.

Further, Congress, under the 1939 Wheeler-Lea Act, had long before made FTC orders under § 5 of the FTC act

"final" unless review was sought within a certain time. If the 1959 amendment to § 11 somehow transformed the FTC into a "court of equity" when examining Clayton Act violations, then the 1938 Wheeler-Lea Act must have similarly transformed the FTC into a "court of equity" when enforcing the FTC Act. This presents the phenomenon that, from 1938 to 1959, the FTC sat as a "court of equity" when enforcing the FTC Act and as an administrative agency when enforcing the Clayton Act.

In short, the Finality Act had no effect on any of the requirements of § 5 (a) in issue here, and is totally irrelevant to the issue of admissibility. It is even more remote from the issue of tolling, for § 5 (b) does not even contain the word "final." See pp. 101-102, *infra*.

b) The legislative history of the Finality Act shows that there was no intent to affect the scope of § 5 in any way. The purpose of the amendment was clearly set out in the Senate Report:

> "Section 1 (c) amends the third, . . . and seventh paragraphs of section 11 of the Clayton Act by substituting in lieu thereof subparagraphs (c), . . . and (l). . . . The sole intent of these subsections is to implement the enforcement procedures of the Clayton Act by making applicable the present Federal Trade Commission enforcement provisions. The changes contained in these subsections are **entirely procedural** and **make no substantive changes in law.**" H.R. Rep. No. 580, 86th Cong., 1st Sess. (1959) (set out in full in Appendix V).

Senator Sparkman told his colleagues: "Let me emphasize that the bill before us today proposes no new departure. **Nothing new** is sought to be injected into our well-established and proven concepts of intelligent, effective enforcement procedures. . . ." 105 **Cong. Rec.** 4465

(1959) (the Congressional debates are set out in full in Appendix W.) To the same effect, see 105 **Cong. Rec.** 12732 (1959) (Remarks of Rep. Huddleston); **Hearings Before the Anti-Trust Subcommittee of the House Committee on the Judiciary on H.R. 432, H.R. 2977, H.R. 6049, and S. 726, 86th Cong., 1st Sess. 14 (1959)**; *id.* at 85. (The entire hearings, except for one totally irrelevant document, are set out in Appendix T.)

Nowhere in all of the hearings, reports, and floor debates is § 5 ever mentioned. This entire legislative history is set out in full in Appendices T through W. Nothing was said about treble-damage suits. No one spoke of converting the FTC into a "court of equity," or of "expand[ing]" the FTC, or of granting it "increased powers." Congress' sole purpose in the 1959 amendment was to lighten the burden of the FTC, not to enrich treble-damage claimants.

c) The Finality Act has consistently been held irrelevant by the courts. An argument based upon the 1959 amendment to § 11 was presented to the Court by the plaintiff in **Highland Supply Corp. v. Reynolds Metals Co.**, 221 F. Supp. 15 (E. D. Mo. 1963), and the foregoing authorities were presented in rebuttal. The court there did not even dignify the argument with a comment in the opinion. On appeal, the plaintiff again advanced this notion. Again the foregoing authorities were presented to the court, and the court of appeals, also, did not even mention the argument. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964). In the case of **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967 (D. Maine 1963), plaintiff devoted over half of its brief to an attempt to persuade the court that the Finality Act of 1959 had somehow changed the law. The District Court for Maine wrote an exhaustive opinion on the issue at bar, but declined

to devote even a footnote to what it apparently considered a spurious argument. Finally, and perhaps most significantly, even the district court in this case, while deciding that § 5 applied to FTC proceedings, failed to see any merit in plaintiff's arguments concerning the 1959 amendment. Thus, the court below stands alone as the only court ever to see the 1959 act as even remotely relevant, much less decisive.

d) In any event, the court below made no attempt to relate its unique construction of the Finality Act to the tolling question, and that act has no possible relevance to the tolling section. See pp. 101-02, *supra*.

7. The use of FTC orders as "prima facie evidence" in treble-damage actions would necessitate a fundamental re-evaluation of the evidentiary rules of administrative law.

It has long been settled that a defendant before an administrative body has no constitutional right to the exclusion of hearsay or other evidence inadmissible in a court of law. The specific rationale for this holding is quite pertinent: "[R]ules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is **not to punish** or to fasten liability on respondents **for past conduct but to ban specific practices for the future** in accordance with the general mandate of Congress." **FTC v. Cement Institute**, 333 U. S. 683, 706 (1948). **Accord, FTC v. Ruberoid Co.**, 343 U. S. 470, 473 (1952): "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."[6]

[6] On this point, the court below apparently overlooked one of its own authorities. For the undisputed proposition that the FTC acts "in the public interest and as an administrative arm of the Government," the court cited *FTC v. Gratz*, 253 U. S. 421, 432, 435

If an FTC order is now to be admitted in a treble-damage action, however, it will result in imposing punitive damages on the FTC's victims, for the sole benefit of private plaintiffs. Such a rule would clash with this Court's analysis in **Cement Institute**, and give the commission's order the effect of punishing the defendant. Having suffered the admission of hearsay testimony in an administrative proceeding because no fine or damages would be levied against it as a consequence thereof, the defendant would now be hit from the other side with punitive damages based on the FTC order. The ruling below would require a re-examination of the **Cement Institute** case and perhaps of our entire administrative procedure.

One rationale for barring hearsay evidence from judicial proceedings is that it infringes on the fundamental right of cross-examination: an out-of-court declarant cannot be cross-examined. Admission of the FTC order here would compound the vice, for the hearsay sneaks in through the back door. At least, when hearsay appears in a trial, a jury can recognize it as such and devalue it accordingly.

(1920), "Justice Brandeis dissenting but not as to the functioning of the Commission." R. 79-80. That opinion reads, in part:

> "In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is *not punitive*. The complaint is not made with a view to subjecting the respondents to *any form of punishment*. It is *not remedial*. The complaint is not filed with a view to affording *compensation for any injury* alleged to have resulted from the matter charged. . . .
>
> "Instead of attempting to inflict punishment for having done prohibited acts, . . . the act undertook to preserve competition through supervisory action of the Commission. . . . Its action was to be *prophylactic*. Its purpose in respect to restraints of trade was *prevention* of diseased business conditions, *not cure*." 253 U. S. at 432, 434-35.

Apparently, the court below failed to realize that, by making FTC orders available as *prima facie* evidence in treble-damage suits, it was injecting the very element into FTC proceedings which this opinion says Congress did not intend them to have—punishment.

But here the jury would have no knowledge of the hearsay and other judicially incompetent evidence on which the FTC order was based and no opportunity to devalue it.

The objections to the use of FTC orders in civil damage actions are illustrated by **Wright v. Carter Prods., Inc.**, 244 F. 2d 53, 59 n. 4 (2d Cir., 1953), noted at pp. 32-33, *supra*:

> "Since this finding was made in a controversy between different parties **and at an administrative hearing conducted according to its own rules of evidence**, it is admissible in the suit at bar only on the issue of notice and not as evidence of the fact of Arrid's propensities. . . ."

The court below ignored **Cement Institute** and **Wright v. Carter Prods.**, but undertook to meet the underlying objections:

> "Judgments and decrees in government suits are only prima facie evidence of antitrust violations. The defendant still has his 'day in Court' on that issue. . . . He is entitled to offer rebuttal evidence to break down the force and effect of that prima facie evidence . . . ." (R. 88).

If the court below means that the defendant in the treble-damage case may prove to the jury the insubstantial basis of the FTC order, the suggestion is hardly practical. That would compel the defendant to present to the jury the very incompetent evidence which was forced upon him in the administrative hearing! It would also require a complete re-litigation of the FTC hearing, not to prove the substantive offense, but to prove the weight to be given to the FTC order. This procedure could not be what Congress desired.

If the court below means, as it apparently does, that *prima facie* evidence really does not have much significance, then the court has utterly failed to grasp the sit-

uation. The effect of the *prima facie* evidence is to reverse the burden of proof. With one stroke, the plaintiff may rest, and the burden falls on the defendant to **prove a negative**—*e. g.*, to prove that there was no conspiracy, or no substantial effect on commerce. Proof of a negative is always difficult, and often impossible. See, *e. g.*, **Elkins v. United States**, 364 U. S. 206, 218 (1960). Thus, the *prima facie* evidence, far from being insignificant, would normally be conclusive. The defendant would be punished in the amount of treble the "damages," without ever having the right of cross-examination, or the advantage of the other "rules which bar certain types of evidence in criminal or quasi-criminal cases." **FTC v. Cement Institute**, 333 U. S. 683, 706 (1948).

Indeed, the authorities cited by the Court below refute its position. For example, in the congressional debate referred to, Sen. Cummins said: "We are discussing something that never will be really material. Any citizen can have all the advantages from a prima facie case that he could have from a **conclusive** case." **51 Cong. Rec. 13856.** As noted in **65 Harv. L. Rev. 1400, 1407 (1952)**: "[I]t is unlikely that a jury will often find for the defendants on an issue on which a Government judgment is prima facie evidence." Any lawyer who has practiced extensively in the antitrust field knows that government judgments or decrees admitted under §5 in treble-damage suits are, as a practical matter, virtually conclusive on the issue of liability. As one of the leading practitioners in the field, Mr. Jerrold G. Van Cise, told the House committee: "Today, if I can introduce in evidence before a jury a Government judgment, whether you call it prima facie or conclusive, it is going to be considered conclusive by the jury." 1950 House Hearings 52. To expect that a defendant will not be harmed by the introduction of an administrative order, based on hearsay and other judicially incompetent testimony, because the court will instruct the jury that

the order is not conclusive is like expecting a jury to disregard a confession of crime because it has been instructed to do so. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." **Krulewitch v. United States**, 336 U. S. 440, 453 (1949) (Jackson, J., concurring).

The court below went considerably further in deprecating judgments or decrees admitted under § 5: "By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor." (R. 90.) Here, the court clearly misread its authorities. Two cases are cited. In **Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.**, 346 U. S. 537 (1954), the prior government suit, termed "the Paramount Case," had established the existence of a conspiracy in 1945. The conspiracy alleged in the treble-damage action existed four years later, from 1949 to 1950. This Court properly noted that "the relevancy of Paramount to the instant case is slight. . . ." 346 U. S. at 544. In **Partmar Corp. v. Paramount Theatres Corp.**, 347 U. S. 89, 102-03 (1954), this Court held that the "judgment or decree" could not be used to prove facts not determined in the prior adjudication.

In sum, in the cited cases, "the Supreme Court . . . pointed to the limited practical value of the prima facie evidence to a private suitor" **where the evidence and decree were irrelevant.** These rulings do not detract from the effect of **relevant** judgments or decrees.

The court below further defended the admission of administrative orders based on hearsay and other incompetent evidence on the ground that there is precedent in the ICC cases. However, in those cases, the agency itself makes a specific reparation award to the injured private party, and the judicial proceeding is merely a proceeding

to enforce that order, not an entirely separate judicial proceeding. Of course, the administrative order is *prima facie* evidence in a suit to enforce the order itself; the FTC order is a good deal more than *prima facie* evidence in enforcement proceedings in the Court of Appeals. Further, an ICC reparation proceeding awards only single, compensatory damages, and is entirely remedial in nature. A treble-damage suit is, by definition, punitive in nature. Neither the court below, nor any party to these suits, nor any court which has decided this issue, has ever cited a case in which an administrative order has been used to exact a **penalty** on behalf of a private litigant. The ICC analogy is irrelevant.

B. Because No Admissible "Judgment or Decree" Results from FTC Proceedings, the Statute of Limitations is Not Tolled Thereby.

1. Sections 5 (a) and 5 (b) Must Be Construed in Pari Materia.

These subsections are merely two paragraphs in the same section. By all canons of construction, they must be construed together. "While we are concerned with the tolling provisions of the second paragraph of that Section [5] only, the two paragraphs are complementary and must be construed together, . . ." **Sun Theatre Corp. v. RKO Radio Pictures**, 213 F. 2d 284, 290 (7th Cir. 1954). See also **Samuel Goldwyn Prods. v. Fox West Coast Theatres Corp.**, 146 F. Supp 905, 908 (N. D. Calif. 1956).

These are not separate statutes being construed, nor even separate sections of the same statute. They are paragraphs of the same section of the same statute, using nearly identical language, and, of course, enacted at the same time:

> " 'In the absence of anything in the statute clearly indicating an intention to the contrary, where the

> same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere * * *.'"

Schooler v. United States, 231 F. 2d 560, 563 (8th Cir. 1956). See **United States v. Cooper Corp.**, 312 U. S. 600, 606 (1941) ("It is hardly credible that Congress used the term 'person' in different senses in the same sentence" of the Clayton Act). Thus, since the FTC proceeding does not fulfill the requirements of § 5 (a), it falls equally short of the identical requirements of § 5 (b).

2. **The Purpose of the Tolling Provision Was to Guarantee That the Private Treble-Damage Litigants Would Be Able to Take Advantage of Admissible Judgments or Decrees.**

Again, the question of purpose turns first on the **original** legislative intent in 1914. The language of the statute plainly demonstrates that the purpose of the tolling provision was to give a treble-damage claimant adequate opportunity to invoke a "judgment or decree," and therefore the tolling provision could not apply to a proceeding which would not result in an admissible judgment or decree. The House Committee report, referring to the "suit or proceeding" described in § 5 (a), stated the purpose of the tolling provision in the same way:

> "This section also provides that the statute of limitation shall be suspended in favor of private litigants who have sustained damage to their property or business by the wrongful act of the defendant during the pendency of the suit or proceeding instituted by or on behalf of the United States." H.R. Rep. No. 627, 63d Cong., 2d Sess. 14 (1914).

Cases construing § 5 (b) have specifically held that its purpose was to grant plaintiffs the benefit of § 5 (a): "The

purpose of this enactment was to enable the plaintiff in a private antitrust suit to rely on a prior judgment in a criminal proceeding, or in a civil suit brought by the Government, as proof of a conspiracy." **Orbo Theatre Corp. v. Loew's, Inc.**, 156 F. Supp. 770, 776 (D. D. C. 1957), **aff'd**, 261 F. 2d 380 (D. C. Cir. 1958), **cert. denied**, 359 U. S. 943 (1959). See also **Charles Rubenstein, Inc. v. Columbia Pictures Corp.**, 154 F. Supp. 216, 218 (D. Minn. 1957), *affirmed on this point on authority of opinion below*, 289 F. 2d 418, 422 (8th Cir. 1961); **Momand v. Universal Film Exchange**, 43 F. Supp. 996, 1012 (D. Mass. 1942).

The court in **Farmington Dowel** was very emphatic on this point: "[T]he evident purpose of the tolling provision . . . is to suspend the statute of limitations in order that private litigants may obtain the benefit of the court decrees in the government litigation." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 (D. Maine 1963).

The decision below is unclear on this point. The court first said:

> "The defendant 3M also suggests that proceedings which cannot yield judgments and decrees applicable as prima facie evidence under Section 5 (a) cannot toll the statute of limitations under Section 5 (b). . . . The House debates support 3M's view solely to the extent that the tolling provision was to enable the private claimant to reap the benefits of the government action, i. e., the use of a government judgment and decree as prima facie evidence. Union Carbide & Carbon Corp. v. Nisely, 300 F. 2d 561 (10th Cir. 1962). But see 51 Cong. Rec. 16003 (1914)." R. 87.

It seems apparent that the two quoted sentences say the same thing, and that "the House debates support 3M's view" in its entirety. If there is any difference between the two propositions, the court below failed to point out

what it is. The **Union Carbide** case was the sole authority cited by the district court for the proposition that a proceeding which could not possibly produce prima facie evidence could still toll the statute. As will be pointed out below, the **Union Carbide** case is in fact diametrically opposed to that view. The congressional debates referred to state unequivocally that § 5 did **not** give treble-damage plaintiffs "the benefit of the investigation which the Government had made and the evidence which was on file in the case." The court concedes that all other authorities cited support the inter-dependency of §§ 5 (a) and 5 (b).

There is further abundant evidence that Congress, in 1914, did **not** intend to toll the statute simply to let a plaintiff wait and take advantage of evidence in the government case where no admissible "judgment or decree" could possibly result. For example:

> "The Senator knows . . . that neither under the section as he drew it nor as it passed the Senate will it be possible to introduce, in the private action, the evidence taken in the Government suits. It is the judgment only that is admissible, not the evidence upon which it was founded." 16149. (Remarks of Sen. Walsh.) (Further quotations appear in Appendix H.)

Indeed, an amendment was actually introduced in the House to give private litigants the benefit of evidence adduced in government proceedings by making such evidence admissible in private treble-damage suits. Following discussion, during which the bill was criticized, *inter alia*, for giving the benefit of such evidence to the defendant as well as the plaintiff, Rep. Floyd, speaking for the committee, asked the House not to adopt the amendment. The amendment was then withdrawn. 9494-95.

Thus, in 1914, the sole purpose in tolling the statute of limitations was to give claimants the benefit of a judgment or decree.

"However," the court of appeals continued, "the decision of the court below that the two subsections should not be regarded as interdependent does have substantial support." R. 89. This sentence appears to refer to the possibility, discussed in the next paragraph of the opinion, that Congress, in 1955, somehow intended to broaden the tolling provision so as to toll the statute of limitations without regard to whether an admissible judgment or decree could conceivably result from the proceedings. Here, the court apparently **concedes** that, at least until 1955, an FTC proceeding could not toll the statute unless an FTC order were admissible: "The above mentioned intention in 1914 does **not seem as plain** in 1955 . . ." R. 89. The "substantial support" for a contrary conclusion today consists of four items.

First, in 1955, Congress added the letters "(a)" and "(b)" to the two paragraphs of § 5. Notably, the court failed to cite a single instance where the lettering of two paragraphs of the same section of a statute, in which the "subsections" were already divided into separate paragraphs, caused language in one subsection to be given a different interpretation from identical language in another subsection, or resulted in a substantial change in the meaning of an existing statute! Clearly, such revisions "are changes hardly substantial enough to warrant any changed construction of the section." **United States v. Ryan**, 284 U. S. 167, 174 (1931).

Second, the court states that: "By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor" (R. 90). The total irrelevance of the authorities relied on to support this extraordinary statement has already been demonstrated at p. 72, *supra*. It is matched by the irrelevance of the statement, even if the statement were valid.

Third, the court attempts to establish that "Section 5 (b) enables 'a plaintiff to take advantage of facts un-

covered' as a result of the government proceedings" by citing only the very district court opinion it is reviewing!

Fourth, the court quotes a sentence from the Senate Report on the 1955 amendent:

> "[T]he plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint." S. Rep. No. 619, 84th Cong., 1st Sess. (1955) (R. 90).

The court fails to note the context of this sentence, which supports the granting of a minimum of one year from the close of the government case within which a treble-damage plaintiff may file suit. The context is totally irrelevant to the suggestion that the statute be tolled when no admissible "judgment or decree" can follow from the government suit. Further, the cited page of the report and the succeeding page are the very pages on which the committee specifically set out the only changes being made in the tolling provisions. One cannot read these two pages, in the light of the existing law prior to the 1955 amendment, without concluding that Congress intended no change in the interdependency of subsections (a) and (b). In sum, there is "**nothing** in the legislative history" to support the lower court's view. **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 n. 7 (D. Maine 1963).

Further, there is substantial affirmative evidence in the legislative history of the 1955 amendment indicating that Congress did not intend to grant private litigants any advantage from the government case other than a "judgment or decree" admissible under § 5 (a). For example, in the 1950 House Hearings, two congressmen expressed

direct antipathy to giving a treble-damage claimant any advantage from government proceedings other than the use of a final judgment or decree:

> "Mr. Michener: I had, within the last few months, an attorney from Michigan come to see me in Washington. He wanted me to assist him in getting certain files in the Department of Justice, which files included an investigation the Department had made of an alleged violation of the antitrust laws. I asked him what he wanted that information for, and he said that he could recover triple damages if he brought suit. Now that the Department of Justice had looked up this case and had done all of the work, there wasn't anything for him left to do except to start suit; and in those files he would find his proof.
>
> **"Now, would you want to give a premium to attorneys of that type, who sit around and wait until the Government has developed a case, has spent the money, and then bring suit for triple damages, and get triple damages based on the work that the Government has done?**
>
> "Mr. Bryson: And maybe have a contract for 50 percent of what they recover.
>
> "Mr. Michener: Yes.
>
> "Mr. Handler: Congressman, the pending bill would not assist the counsel in the case that you have put. The files of the Government are closed to the private litigant. He must establish his case following the normal procedure applicable in the Federal courts himself or he must stand by and await the conclusion of the Government litigation and it is only after that litigation is concluded, and final judgment is entered after contest, that the judgment or decree becomes available to him." 1950 House Hearings 5. (See App. M.)

Note, too, the witness' statement that: "The files of the Government are closed to the private litigant." Had Con-

gress truly desired to give private litigants "the benefits of a Government investigation," it could easily have done so by opening the government files.

Also significant is the treatment accorded the new government single-damage suits. H. R. 7905, proposed in 1950, excluded such damage suits from the "prima facie evidence" provisions, but provided that the statute of limitations would be tolled during such suits. This latter provision met with opposition:

> "It does not seem necessary or advisable to include within the purview of section 5 (b) a civil action brought by the United States to recover for damages pursuant to section 4 (b) of the proposed act. **A judgment in such a civil action is expressly excluded from the provisions of section 5 (a)** making judgment [*sic*] or decrees in civil or criminal proceedings brought by the United States conclusive evidence against a defendant in a triple-damage action. **There seems to be no good reason, therefore, why under section 5 (b) the statute of limitations should be suspended** during the pendency of a Government suit to recover damages. . . . There is no reason, however, for making the pendency of a private lawsuit by the Government to recover damages an excuse for suspending the operation of the limitations act." 1950 House Hearings 97 (Comment of the Standing Committee on Commerce of the American Bar Association).

These amendments were retained in the original version of H. R. 3708 as considered by the committee, and again a bar association pointed out to the committee:

> "A judgment in a damage suit by the United States, however, would not be evidence against a defendant in a triple-damage suit, and there is no reason for further suspending the statute of limitations

pending such damage suits." 1951 House Hearings 28 (Report of Committee on Federal Legislation of The New York County Lawyers Association).

When the House committee report issued, it **specifically excluded government damage suits from the tolling provisions**, and this exclusion prevailed when the amendment was finally passed. No clearer expression could be found of legislative intent that the statute of limitations should be tolled only for proceedings which can result in a judgment or decree admissible as *prima facie* evidence.

Moreover, the "**3M**" court's policy decision, favoring the tolling of the statute, to give plaintiff an opportunity for whatever discovery he might be able to engage in with respect to the results of an FTC investigation, ignores the basic purpose of treble-damage actions—to aid in enforcement of the antitrust laws. "The three-fold damage clause of Section 15 was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement." **Weinberg v. Sinclair Refining Co.**, 48 F. Supp. 203, 205 (E. D. N. Y. 1942). **Accord, Maltz v. Sax**, 134 F. 2d 2, 4 (7th Cir.), **cert. denied**, 319 U. S. 772 (1943). The main purpose of the antitrust laws "was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose." **Kinnear-Weed Corp. v. Humble Oil & Refining Co.**, 214 F. 2d 891, 893 (5th Cir. 1954), **cert. denied**, 348 U. S. 912 (1955). Even the court below recognized that the purpose of "private antitrust suits" was not only to "supplement government actions" but "perhaps in some cases" to "make them unnecessary" (R. 74). If the decision below, which greatly enlarges the coverage of § 5, is allowed to stand, it will permit potential claimants to sit back and let the FTC do their work for them. The legislative history of the 1955 amendment demonstrates direct antipathy to such a result (see

the remarks of Reps. Michener and Bryson cited at p. 79 *supra*).

Furthermore, this suggestion would permit a potential plaintiff to force the agencies charged with enforcement of the Clayton Act (the FTC, the FCC, the ICC, the CAB, and the Federal Reserve Board) to do his investigating for him. The jurisdiction of all such agencies is mandatory. A complainant may set an FTC investigation in motion; thereafter:

> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint . . . ." 15 U. S. C. § 21(b).

Thus, if reasonable grounds were uncovered to make out a case, a complaint would issue, and the private party would merely have to wait until the agency had done most of his work for him and then bring his suit. In this way, the primary purpose in granting private litigants a cause of action under the antitrust laws would be effectively emasculated by a decision tolling the statute of limitations during the pendency of agency proceedings.

Finally, Congress in 1955 specifically inveighed against procedures which "prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts." S. Rep. No. 624, 84th Cong., 1st Sess. 6 (1955). A decision overturning 49 years of settled practice and greatly enlarging the scope of the tolling provisions undoubtedly would have such an effect.

Significantly, the court below declined to rely on the only judicial authority cited by the district court for the proposition that § 5(b) should be given a different interpretation from § 5(a). In **Union Carbide & Carbon Corp.**

v. Nisley, 300 F. 2d 561, 569 (10th Cir. 1962), the United States had sued and obtained a judgment against defendant for conspiracy. The private suits

> "alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied 'in part' on the same means for the effectuation of the same conspiracy." 300 F. 2d at 570.

Defendant apparently contended that, since certain "overt acts" alleged by plaintiffs were not included in the government conspiracy case, the statute of limitations was not tolled as to those overt acts, even though the conspiracy was the same in both suits. The court quite properly rejected this argument: "There was substantial identity of subject matter, and this was sufficient to suspend the running of the statute." 300 F. 2d at 570.

This result was clearly commanded by the statute: "[T]he running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof. . . ." 15 U. S. C., § 16 (b). If the same conspiracy is the basis of the government suit, the statute of limitations is tolled as to the "right of action" for that conspiracy. The opposite result would have been ridiculous, requiring plaintiff to bring suit as to certain overt acts before the statute ran, and as to others at the end of the government proceedings (both suits for the same conspiracy!). Thus, the holding is that, in the case of a conspiracy, when the statute is tolled as to part of the cause of action, it is tolled as to the whole cause of action. This is quite a different thing from saying that Congress intended to toll the statute for a private litigant so that he will not have to conduct his own discovery, even

though the final judgment or decree will not be admissible as *prima facie* evidence.

Actually, the language of the case is directly contrary to the purpose for which it was cited by the district court:

> "The purpose of the first paragraph of section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions'; . . .
>
> "The **corollary purpose** of the tolling provisions of the second paragraph of Section 5 **is to vouchsafe the intended benefits of related government proceedings** by suspending the running of the statute of limitations until the termination of the government proceedings and allowing the private suitor one year thereafter in which to prepare and file his suit." 300 F. 2d at 569.

The "intended benefits" of the second paragraph relate to the advantage of the "estoppel doctrine" in the first paragraph. Where the final judgment or decree is not admissible, the plaintiff gains no advantage from the estoppel doctrine. Without such "intended benefits," the "corollary purpose" disappears, and the statute is not tolled.

The court below was thus quite correct in rejecting the district court's error, and in citing **Union Carbide** for the proposition that: "[T]he tolling provision was to enable the private claimant to reap the benefits of the government action, i. e., the use of a government judgment and decree as prima facie evidence." R. 87. **Accord, Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 971 n. 7 (D. Maine 1963).

In sum, because an FTC order is not admissible under § 5 (a), the statute of limitations is not tolled by the FTC proceedings.

III. The Language and Legislative History of the Tolling Statute Preclude Tolling for FTC Proceedings.

A. The 1914 Legislation.

1. The language of the original § 5 (b) excludes an FTC proceeding, because such a proceeding is not a "suit or proceeding in equity" nor is it "instituted by the United States."

As enacted in 1914, the second paragraph of § 5 [now § 5 (b)] read:

> "Whenever any suit or proceeding in equity or criminal prosecution is **instituted by the United States** to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

As with the first paragraph, this language is clearly judicial in tone, and was intended to apply only to judicial proceedings. See pp. 13-14 *supra*. An FTC hearing is not a "suit or proceeding in equity." See pp. 16-21 *supra*.

There is one significant difference between § 5 (b) and § 5 (a). Section 5 (a) requires that suit be "**brought by or on behalf** of the United States." An FTC proceeding is not "brought by or on behalf of the United States." See pp. 21-22 *supra*.

Even if an FTC proceeding could be said to have been brought "on behalf of the United States," however, it certainly was not "instituted **by** the United States." **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725, 730-31 (8th Cir. 1964); **Volasco Prods. Co. v. Lloyd**

A. Fry Roofing Co., 223 F. Supp. 712, 713 (E. D. Tenn. 1963). A leading case is **United States Alkali Export Ass'n v. United States**, 325 U. S. 196 (1945), where the defendant resisted an action by the United States under the Sherman Act on the ground that exclusive jurisdiction rested in the FTC. The court rejected the defense, upholding the concurrent jurisdiction of the FTC and the United States in language which clearly demonstrates that the commission is not the United States:

> "The contention is that since the alleged violations are being committed by and on behalf of export associations which have conformed to § 5 of the latter Act, the authority of the **United States** to maintain the suit is suspended until the **Federal Trade Commission** has proceeded against the associations by way of investigation and, if found appropriate, by way of recommendations to them and reference of its findings to the **Attorney General**, as specified in § 5.
>
> "It is conceded that § 5 contains no explicit restriction on the authority of the **United States** to institute antitrust suits in the normal way, nor any explicit requirement that resort be had to the **Commission** prior to the institution of such an antitrust suit. . . .
>
> ". . .
>
> ". . . [I]nvestigations by the **Commission** have never been deemed prerequisite to antitrust suits by the **United States**; and there is nothing to suggest that Congress, in authorizing the **Commission** to investigate export associations, intended to place such investigations on any different footing than others, which the Commission had already been authorized to conduct." 325 U. S. at 205-07.

There are other cases where this Court has specifically recognized the distinction between "the United States" and "the Federal Trade Commission," *e. g.*, **United States v. Cooper Corp.**, 312 U. S. 600, 612 n. 17 (1941): "Repre-

sentative Webb, the chairman of . . . [the House Judiciary] Committee, mentioned the civil remedies available under the bill as treble damage actions by persons, suits by the **Federal Trade Commission**, suits by **the United States** for injunctions, and similar suits by persons."

Moreover, in many other statutes, and especially in the Clayton Act and FTC Acts themselves, Congress has carefully and explicitly distinguished between the "commission" and the "United States." Note the careful usage in the contemporaneous FTC Act:

§ 6 (38 Stat. 721 (1914), now 15 U. S. C., § 46): [T]he **commission** shall also have power . . . .

> "(c) Whenever a final decree has been entered against any defendant corporation in any suit **brought by the United States** . . . to make investigation [of compliance] . . . and upon the application of the **Attorney General** it shall be **its** duty to make such investigation. **It** shall transmit to the **Attorney General** a report . . ."

§ 7 (38 Stat. 722 (1914), now 15 U. S. C., § 47): "[I]n any suit in equity brought **by or under the direction of the Attorney General** as provided in the antitrust Acts, the court may. . . . refer said suit to the **commission**, as a master in chancery . . ."

§ 9 (38 Stat. 722 (1914), now 15 U. S. C., § 49): " . . . Upon the application of the **Attorney General of the United States**, at the request of the **commission**, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding . . . [compliance with this Act] or any order of the **commission** . . ."

§ 10 (38 Stat. 723 (1914), now 15 U. S. C., § 50): ". . . If any corporation required . . . to file any . . . report shall fail so to do within the time fixed by the **commission** . . . the corporation shall forfeit to the **United States** the sum of $100 . . . payable into the

Treasury of the **United States**, and shall be recoverable in a civil suit **in the name of the United States** . . . It shall be the duty of the various district [now United States] attorneys, under the direction of the **Attorney General of the United States**, to prosecute for the recovery of forfeitures."

This distinction has been preserved in later additions to the Act:

§ 13 (a) (52 Stat. 115 (1938), now 15 U. S. C., § 53 (a)): "Whenever the **Commission** has reason to believe [that any person is about to disseminate unlawful false advertising] . . . the **Commission** by any of **its** attorneys . . . may bring suit in a district court of the United States . . . [for injunction]."

§ 16 (52 Stat. 116 (1938), now 15 U. S. C., § 56): "Whenever the **Federal Trade Commission** has reason to believe that any person . . . is liable to a penalty . . . **it** shall certify the facts to the **Attorney General**, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement . . ."

Note also § 13 of the Clayton Act (15 U. S. C., § 23): "In any suit, action, or proceeding brought **by or on behalf of the United States** subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district. . . ." If Congress had intended this subpoena power to apply to the FTC, it would have been entirely unnecessary for it to provide, as it did in § 9 of the FTC Act (15 U. S. C., § 49), that: "[T]he **commission** shall have power to require by subpoena the attendance and testimony of witnesses . . . . Such attendance of witnesses . . . may be required from any place in the United States, at any designated place of hearing."

As recently as 1959, in enacting the very Finality Act on which the court below apparently relied, Congress demonstrated its continued clear understanding of the

distinction between the legislative terms "commission" and "United States," providing in 15 U. S. C., § 21 (l): "Any person who violates any order issued by the **commission** . . . shall forfeit and pay to the **United States** a civil penalty . . . which shall accrue to the **United States** and may be recovered in a civil action brought by the **United States.**"

The lower courts, as well as this court, have consistently recognized that the United States and the FTC are separate entities, not to be confused with one another. For example, in **FTC v. Nash-Finch Co.**, 288 F. 2d 407 (D. C. Cir. 1961), a corporation sought a declaratory judgment against the FTC. The commission sought dismissal of the suit on the ground that "the United States is an indispensable party" and had not been joined. In deciding that "the United States" was not an indispensable party, the court held: "But appellee does not now complain of any action taken or threatened by the **United States** for penalties. Action of the **Commission** alone is now challenged." 288 F. 2d at 410.

In **United States v. Aluminum Co. of America**, 1 F. R. D. 48, 49 (S. D. N. Y. 1938), the court not only recognized that "the United States" and the FTC were not the same party, but held that they were not even in privity for purposes of the admission of evidence. The question therein was whether the testimony of a witness, since deceased, taken in an FTC proceeding, was admissible in a later Justice Department suit against the same defendant. This issue turned

> "on the existence of a relationship of privity between . . . the Federal Trade Commission and the United States.
>
> ". . .
>
> "The United States was not a party to the Federal Trade Commission proceeding. Only the Federal

> Trade Commission was a complainant in that proceeding." 1 F. R. D. at 49.

Finding no "privity in law," the court excluded the testimony.

An administrative agency such as the FTC is a separate entity, capable of suing and being sued in its own right. The United States and an agency may appear as separate parties in a suit and present opposing views, **e. g., Henderson v. United States**, 339 U. S. 816 (1950). The United States may refuse to appear in a case, but allow an agency to appear and present views in conflict with those of the United States, **e. g., Standard Oil Co. v. FTC**, 340 U. S. 231 (1951) [for discussion of these and numerous other examples, see Stern, **"Inconsistency" in Government Litigation**, 64 Harv. L. Rev. 759, 760 (1951)]. Even more persuasive is the fact that the United States may bring an action **against** an agency to set aside an order. Such litigation does not constitute a sham proceeding, but presents a "case or controversy" justiciable under Article III of the Constitution, **e. g., United States v. ICC**, 337 U. S. 426 (1949). From these cases, it is clear that an FTC proceeding is not "instituted by the United States."

In the original Clayton Act, the ICC also was given power to enforce its provisions. 15 U. S. C. § 21 (a). The relationship between the ICC and the United States is therefore of significance, in determining congressional intent. By the time the Clayton Act was passed in 1914, it had long since been settled that an agency such as the ICC was "a body corporate, with the legal capacity to be a party plaintiff or defendant in the federal courts . . . ." **Judson, Interstate Commerce** 493 (1912). Congress was well aware of this distinction and made use of it with regard to the ICC. Prior to 1910, only the ICC or an injured party could bring an action to enforce an order other than for the payment of money. By the Act of

June 18, 1910, the United States was added as a **separate** party authorized to bring such actions:

> "If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the **Interstate Commerce Commission** or any party injured thereby, or **the United States,** by its Attorney General, may apply to the Commerce Court for the enforcement of such order." 36 Stat. 555 (1910). [This provision is now contained in 49 U. S. C., § 16 (12).]

By the Commerce Court Act of June 18, 1910, only four years before the original enactment of the tolling provision, Congress also provided:

> "That all cases and proceedings in the Commerce Court which but for this Act would be brought **by** or against the **Interstate Commerce Commission** shall be brought **by or against the United States,** and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved. . . . **Provided, That the Interstate Commerce Commission** and any party or parties in interest to the proceeding before the Commission, . . . may appear as parties thereto of their own motion and as of right, and be represented by their counsel, . . ." 36 Stat. 539 (1910). (This provision is now covered by 28 U. S. C., §§ 2321-23.)

See 36 Stat. 1150-51 (1911). Thus, Congress demonstrated its clear understanding of the distinction, in litigation, between the "United States" and the independent commissions. These provisions were thoroughly discussed in **ICC v. Oregon-Washington R. R. & Nav. Co.,** 288 U. S. 14, 22-27 (1933), and this Court accepted the distinction between the ICC and the United States without question.

A holding in the case at bar that a proceedin, brought by the FTC is a proceeding "**instituted by the United**

States'' would apply equally to an ICC proceeding enforcing the Clayton Act (and to an FCC, a CAB, or a Federal Reserve Board proceeding). Such a holding would make the above statutes and Supreme Court decisions meaningless, and would fly in the teeth of the clearly expressed congressional purpose to distinguish between ''the United States'' and an administrative agency.

The court below made no attempt to refute or distinguish the above authorities. Rather, the court set forth generalities of the relationship of '' 'efficient cooperation' '' between the FTC and the Justice Department, of the FTC ''as a 'representative of the United States,' '' and of the ''reality'' that ''the Commission functions . . . in the public interest and as an administrative arm of the Government'' (R. 78-80). These generalizations are totally irrelevant to the specific requirement of a suit ''instituted by the United States.'' Even if these generalizations were to some slight degree relevant, they could go only to show that the FTC acts ''**on behalf of** the United States.'' But the requirement of § 5 (b) is a suit ''instituted **by** the United States.'' The court below apparently failed to note that the phrase ''on behalf of'' does **not** appear in § 5 (b), for, while ostensibly setting out to prove that an FTC proceeding is ''instituted by the United States'' (R. 78), the court goes on to state that the ''question'' is whether an FTC proceeding is ''a proceeding **on behalf of** the United States'' (R. 81), and holds that an FTC ''action must be regarded as one **on behalf of** the United States'' (R. 79). Perhaps, had the lower court accurately noted the precise language of § 5 (b), it would have reached a different conclusion.

The court's unique construction of § 5 (a), *i. e.*, that the ''suit or proceeding in equity'' requirement therein was met by ''the proceeding before the Court of Appeals,'' suggests another possible explanation for the difference

between § 5 (a) ("**brought** by **or on behalf of** the United States") and § 5 (b) ("**instituted by** the United States"). If it be assumed *arguendo*, despite the overwhelming evidence to the contrary (see pp. 16, 18-21, 46-49 *supra*), that a decree of a court of appeals enforcing an FTC order was intended to be admissible under § 5 (a), it is irrefutably clear that FTC proceedings could not have tolled the statute of limitations. As noted earlier, under the original statute, there was no time limit within which either the commission or the respondent must bring enforcement or review proceedings in the court of appeals. If the statute were tolled from the institution of FTC proceedings until the court of appeals issued a decree affirming the FTC order, the statute could be tolled ten, twenty, or fifty years, or, indeed, forever. Theoretically, it is conceivable that Congress intended that, when the FTC sought and achieved enforcement of its order, such order should then be admissible, but on that assumption Congress surely recognized that to apply the tolling provision to FTC proceedings would lead to the absurd result of tolling the statute forever, and surely intended to foreclose such an absurdity by omitting the phrase "on behalf of" from § 5 (b). There would be some logic to such a result, because the FTC could not institute enforcement proceedings until the respondent had violated the FTC order, and, the respondent having thus been forewarned that its conduct was illegal, such punishment for its conduct could have been considered proper. Some additional support for such an argument might be found in the use of the term "instituted" in § 5(b) in place of the term "brought" used in § 5 (a), since the former term is more clearly limited to the initiation of proceedings than is the latter term.

In sum, whatever may be contended about the FTC as a "representative" of the United States, an FTC proceeding is clearly not one **"instituted by the United States."**

2. The History of the 1914 Legislation Demonstrates That Congress Did Not Intend FTC Proceedings to Toll the Statute of Limitations, and Deliberately Excluded From the Tolling Statute Proceedings "on Behalf of the United States."

As in the case of the "prima facie" evidence clause, nowhere in the voluminous debates and committee reports does any suggestion appear that FTC proceedings would toll the statute of limitations. Both the FTC Act and the Clayton Act were considered in the same session of Congress, in 1914, and numerous cross-references appear throughout the debates. Had Congress entertained any intent that FTC proceedings should toll the statute of limitations, it seems inconceivable that such intent would remain unexpressed and undebated.

On the contrary, the debates and reports of 1914 conclusively establish that Congress intended § 5 to apply only to injunction or criminal proceedings brought by the United States in the federal courts. See pp. 33-49 *supra*.

Beyond that, assuming *arguendo* that an FTC proceeding could be deemed a proceeding "on behalf of" the United States within the meaning of § 5 (a), S. Rep. No. 698, 63d Cong., 2d Sess. (1914) (set forth in full in App. J), conclusively demonstrates that Congress **deliberately excluded such proceedings from the scope of the tolling provision** (§ 5 (b)).

That report shows that the Clayton Bill, as passed by the House, would have tolled the statute for suits "brought by or **on behalf of** the United States," using language identical to the language of the *prima facie* evidence clause. The Senate Committee made numerous changes in the bill, including two of vital significance: (1) § 11 (then § 9b) was added, giving the FTC power to enforce the Clayton Act prohibitions; and (2) apparently fearing that the newly added FTC enforcement proce-

dures might be improperly considered, by the courts, to be proceedings "on behalf of" the United States so as to toll the statute of limitations, the Committee **struck from the tolling provision** the phrase "brought by or on behalf of the United States" and deliberately inserted in its place the more restrictive language "instituted by the United States." This latter language was preserved through final passage. "That Congress had in mind the separate and distinct meanings of these two expressions is clearly demonstrated . . ." by this deliberate change. **United States v. Wurts**, 303 U. S. 414, 417 (1938). The Congress could not more clearly and emphatically have rejected the interpretation advanced by the court below.

Further analysis of the bill as reported out by the Senate Committee offers further possible explanation of the words "on behalf of" in the *prima facie* evidence clause, and their exclusion in the tolling clause. The FTC proceedings authorized in that draft were not reviewable in the court of appeals, as in the final draft. In case of failure to obey an FTC order, the Senate Committee draft provided (§ 9b) that "the said **commission**, by its attorneys, if any it has, or by the appropriate **district attorney** acting under the direction of the **Attorney General of the United States**, may apply for an enforcement of such order to the district court . . . [which] shall have power to make . . . such orders and decrees as may be just and equitable . . ." The order of the commission was to be prima facie evidence **in that enforcement proceeding**, but the respondent could adduce additional evidence, as in the case of the ICC enforcement proceeding. See pp. 72-73, *supra*. The proposed *de novo* judicial enforcement proceeding would have resulted in a judicial decree, which the Senate Committee may well have considered appropriate for admission as *prima facie* evidence in a treble damage suit. But such proceedings, like the appellate review proceedings authorized in the final law (see p. 93, *supra*), were clearly inappropriate for tolling the statute of limitations,

because they might not commence for many years, if ever, and the statute of limitations would be tolled indefinitely.

Section 9b of the Senate Committee bill is further instructive for its distinction between the United States and the commission:

> "Any party to any proceeding brought under the provisions of this section before either the Interstate Commerce Commission or the **Federal Trade Commission . . . as well as the United States** by and through the Attorney General thereof, may appeal from any final **order** made by either of such **commissions** to any court having jurisdiction to enforce any **order** . . ."

3. The Total Absence of Any Attempt to Apply § 5 (b) to FTC Proceedings Indicates that No Such Application Was Intended.

> "Although Section 5 of the Clayton Act has been in effect for 49 [now 50] years, counsel have called to the Court's attention no case, prior to 1963, in which a plaintiff has even attempted to assert that a Federal Trade Commission proceeding tolled the statute of limitations in a private antitrust action under Section 5(b). In such circumstances, the observation of Mr. Justice Frankfurter in Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 352, . . . (1941), is pertinent:
>
> '[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'
>
> Accord, United States v. Cooper Corp., 312 U. S. 600, 613-14 . . . (1941)." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 973-74 (D. Maine 1963).

B. **The 1955 Amendment Did Not Enlarge the Scope of § 5 (b).**

The court below correctly concluded that the 1955 amendment did not enlarge the scope of § 5 (b). Consequently, that contention will be discussed only briefly here.

1. **The Term "Civil Proceeding" Does Not Include FTC Proceedings.**

The only change in § 5 (b) since its passage in 1914 which has been urged as relevant in any way is the substitution, in 1955, of the phrase "civil or criminal proceeding" for the phrase "criminal prosecution or suit or proceeding in equity." The requirement that the proceeding be "instituted by the United States" remains unchanged. As previously shown, an FTC proceeding is not "instituted by the United States," and even if this requirement were satisfied, an FTC proceeding is still not a "civil or criminal proceeding." See pp. 16-21, *supra*.

2. **Legislative history conclusively demonstrates that the 1955 legislation was not intended to effect any change in § 5 (b).**

First, it has already been established that no substantive change was intended by an identical amendment to § 5 (a), and that § 5 in its entirety was to remain substantively unchanged (see pp. 52-63, *supra*). It would indeed be strange if Congress intended the substitution of identical language for identical language, in two paragraphs of the same section of a statute, to work a substantive change in § 5 (b) and not in § 5 (a).

Second, it was emphatically stated in the committee hearings that no change was intended in § 5 (b):

> "The Chairman: . . . Section 5 of the Clayton Act in the second paragraph reads as follows:
>
> ". . .

"Mr. Keating: H. R. 7905 in no way changes the subsection to which the chairman has referred; is that right? It still is left in the law as it is?

"The Chairman: That is why I think the draftsmanship is wrong.

"Mr. Bernhart: I think the draftsmanship is right on that point." 1950 House Hearings 16. (See App. M.)

Note that the term "civil or criminal proceeding" was used in H.R. 7905.

Third, the Senate debate also contains a specific statement that no change was intended in the scope of the tolling provision:

> "Present section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. **This period is continued** in the present bill." 101 Cong. Rec. 9165. (Remarks of Sen. Kilgore.)

Fourth, throughout the various drafts of the bill, various changes in the tolling provision were specifically enumerated. Nowhere is it suggested that substitution of the words "civil or criminal proceeding" was more than a language change. For example, H.R. Rep. No. 422, 84th Cong., 1st Sess. 2 (1955), delineates the changes made in the tolling provisions:

> "Section 2 of the bill amends section 5 of the Clayton Act by providing that the statute of limitations with respect to private antitrust actions shall be tolled for an additional year after the termination of a Government antitrust proceeding in order to permit the parties to take full advantage of a final Government decree as prima facie evidence of their case and to have sufficient time in which to file suit.
>
> "It further provides that while the period in which to bring a private treble damage action shall in no

> case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding, private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have elapsed since the cause of action accrued. This requirement is designed to prevent interminable delay and congestion of court calendars, as well as encouraging the prompt adjudication of private treble damage suits."

A later section of the Report (quoted in relevant part in Appendix G) explains these changes. There is not the slightest intimation of a design to alter the coverage of § 5 (b). Thus, the committee told the Congress what changes the bill would make, and made no mention of a change concerning administrative proceedings.

Similarly, S. Rep. No. 619, 84th Cong., 1st Sess., 5-6 (1955), states: "This bill makes several important changes in the tolling provisions of existing law," and proceeds to list them. First, "the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter." Second, the bill requires "that the plaintiff bring this suit within 4 years after it accrued or within 1 year after the Government's case has been concluded." That is all; there are no other changes. (Relevant matter in this Report is set out in full in Appendix G.)

On the floor of the House, Congressman Celler, Chairman of the Judiciary Committee and of the subcommittee which prepared the bill, explained carefully to the House the changes made in its tolling provisions, but mentioned no changes other than those noted above in the committee reports. 101 **Cong. Rec.** 5139 (1955). Senator Kilgore also enumerated these same changes in the tolling provisions, making no reference to any change encompassing

FTC proceedings. 101 **Cong. Rec.** 9165-66. (Quoted in full in Appendix G.) Thus, in the Senate Report, the House Report, on the floor of the Senate, and on the floor of the House, the changes made in the tolling provisions were explicitly set out. Expansion of the scope of subsection 5 (b) was definitely not among them. If the committees which handled this bill intended to make any such change in the law, they fraudulently concealed their purpose from the Congress. Even if this Court were inclined to impute such conduct to the committees and their chairmen, it would remain true that the Congress itself had no such purpose.

Further, statements from the Department of Justice and the FTC were placed in the record at the 1950 hearings. The Justice Department pointed out that the bill in question would amend § 5 "by providing that the statute would also be tolled by the institution of a suit for damages brought by the United States." No other amendment was noted. 1950 House Hearings 62-65. The FTC report merely paraphrased the language of the amended section without comment. 1950 House Hearings 66. Thus, neither of the two agencies responsible for the enforcement of the antitrust laws stated that the proposed amendment to § 5 would or should toll the statute of limitations during the pendency of FTC proceedings. (Appendix G includes the paragraph of the FTC report restating the tolling provisions.)

The legislative history of the 1955 amendment thus makes it quite clear that no change in the scope of the tolling provisions was intended.

3. **Congress Changed the Wording of § 5 (b) to Conform to the Federal Rules of Civil Procedure.**

The Federal Rules of Civil Procedure abolished the distinction between law and equity. "There shall be one form of action to be known as 'civil action'." Fed. R. Civ. P. 2.

To have amended § 5 without conforming the language therein to current procedure would have been very poor draftsmanship. Congress had no other intent in revising the language of § 5 (b). "[T]he reasonable conclusion is that Congress merely changed the language to conform to that of the Federal Rules of Civil Procedure, . . ." **Farmington Dowel Prods. Co. v. Forster Mfg. Co.**, 223 F. Supp. 967, 972 (D. Maine 1963).

C. **The Finality Act of 1959 is totally irrelevant to the interpretation of § 5 (b).**

The court below advanced the novel assertion (unheard of in 49 years of litigation) that review proceedings in a court of appeals satisfied the original requirements of § 5 (a) and resulted in an admissible "judgment or decree," and then asserted that, since the Finality Act of 1959 made FTC orders final if the respondent did not seek review within sixty days, FTC orders somehow became admissible also. The logical and legal objections to both the premise and the conclusion are detailed at pp. 16, 18-21, 46-49, 64-68, *supra*, together with a complete examination of all the relevant legislative history, which proves conclusively the total absence of any hint of congressional intent to achieve such a result.

The court below made no attempt to relate its analysis of § 5 (a) with regard to review proceedings to the tolling provision (§ 5 (b)). Nor did the court attempt to relate the supposed effect of the Finality Act of 1959 on § 5 (a) to the tolling paragraph of § 5. The court simply jumped from its erroneous conclusion as to § 5 (a), to a further conclusion as to § 5 (b), without consideration of the statutory language.

The irrelevancy of this 1959 shift in the burden of seeking review is inescapable. The only effect of the 1959 legislation is upon the status of FTC orders **after** they are handed down by the commission. The Act simply

makes such orders "final?" Yet § 5 (b) does not require a "judgment or decree," much less "finality." While the 1959 Act supplied one of the requirements of § 5 (a) (finality), it supplied **none** of the requirements of § 5 (b).

An essential element of the lower court's analysis is that, from 1914 until 1959, FTC proceedings did not toll the statute of limitations. That is correct. In terms of the statutory language, the court necessarily held that an FTC proceeding either is not a "civil proceeding" (or a "suit or proceeding in equity"), or is not "instituted by the United States," or both. These are the only relevant requirements of § 5 (b) on which the lower court could rely. There is no way in which the 1959 amendment to the Clayton Act could have changed those requirements, or could have transformed FTC proceedings to fit those requirements.[7] This same spurious argument was made to the courts noted at p. 67, *supra*, and was not even deemed worthy of comment by those courts.

D. **The Decision Below Is Directly Contrary to That of All of the Other Federal Courts Which Have Considered the Question, and the Antitrust Bar Agrees that FTC Proceedings Are Not Within the Scope of § 5 (b).**

From 1914 until the district court's decision in April, 1963, there is no record of a treble-damage plaintiff even having considered it worthwhile to contend that FTC proceedings tolled the statute of limitations. The district court's unprecedented decision was thereafter presented to one court of appeals and three district courts, and decisively rejected by all. **Highland Supply Corp. v. Reynolds Metals Co.**, 327 F. 2d 725 (8th Cir. 1964), **reversing on other grounds but affirming on the issue at bar**, 221 F. Supp. 15 (E. D. Mo. 1963); **Farmington Dowel Prods. Co.**

[7] As pointed out at pp. 88-89, *supra*, the very language of the 1959 Act demonstrates Congress' continued understanding that the FTC is *not* the United States.

v. Forster Mfg. Co., 223 F. Supp. 967 (D. Maine 1963); **Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.**, 223 F. Supp. 712 (E. D. Tenn. 1963). Those secondary authorities which have specifically considered § 5 (b) apart from § 5 (a) concur. Butler 42-47; 1961 CCH Trade Reg. Rep., ¶ 9157. Thus, the court below stands totally alone in its decision. By the weight of all authority, it is clear that § 5 (b) of the Clayton Act does not, and was not intended to, apply to FTC proceedings.

IV. The Policy Considerations Which Governed the Decision Below Cannot Properly Be Resolved by the Courts.

The essence of the decision below is the argument that, with "increased powers," the "expanded" FTC proceedings have gained general acceptance, and should now be regarded as sufficiently judicial in nature that they should now be treated by the courts as "suits in equity" or "civil proceedings," and FTC orders should now be treated as "judgments or decrees." The argument is invalid, for FTC proceedings are very different from judicial proceedings, and are permitted only because they have very different consequences. See pp. 10-13, 68-73 *supra*. But the argument is more than invalid; it exceeds the bounds of judicial discretion. Congress has drawn the statute to exclude FTC proceedings unequivocally. "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." **62 Cases of Jam v. United States**, 340 U. S. 593, 600 (1951).

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose

> that it should have been made more comprehensive. . . . For the ultimate question is what has Congress commanded . . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'" **Addison v. Holly Hill Fruit Prods.**, 322 U. S. 607, 617-18 (1944).

In substance, the court below simply decided that it "seem[s] logical" to toll the statute of limitations for FTC proceedings (R. 80). But, as this Court wisely said in **United States v. Cooper Corp.**, 312 U. S. 600, 606 (1941): "[I]t is not for the courts to indulge in the business of policy making in the field of anti-trust legislation."

The conflicting interests which lurk in the background of this case are peculiarly within the competence of Congress to resolve. Should private treble-damage claimants be encouraged to ferret out violations of the antitrust laws, and thereby serve as an ancillary arm of enforcement? If so, as Congress apparently decided in 1890, they should not be invited to "sit around and wait until the Government has developed a case, and then bring suit for triple damages, . . . based on the work that the Government has done" (Rep. Michener, p. 79, *supra*). Or should the "ancillary enforcement" theory be subordinated in whole or in part to other interests, or abandoned entirely? If it is to be abandoned, then the treble-damage remedy would serve a purely punitive purpose; in that event, would it be desirable to eliminate the need for proof of liability in most treble-damage cases, by admitting in evidence orders of the FTC and other agencies as well as the courts?

Congress has already answered these questions. In 1890, the "ancillary enforcement" theory held sway, and apparently not even United States criminal proceedings tolled the statute of limitations, or resulted in admissible judgments. In 1914, Congress compromised these in-

terests, and adjusted the statute to provide that judicial—but not administrative—proceedings would pave the way for treble-damage claimants. In 1955, with full knowledge of the experience gained in the previous 65 years, Congress deliberately re-enacted the statute with no relevant change.

Thus, from the very beginning, Congress has deliberately refused to give to administrative proceedings the effects which the lower court would give. If this Court should decide that the time has come to overrule the decision of Congress, what would be the consequences? Would the new rule require (as a matter of constitutional law, or of legislative choice) a tightening of administrative procedures? See pp. 68-73, *supra*. And would that tightening unduly hamper the activities of the administrative agencies? Should these questions be answered differently, when applied to the ICC, the FCC, the CAB, or the Federal Reserve Board, instead of the FTC? Or should the new rule apply to only some of those agencies?

> "Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, . . . these and many other subtle factors must influence legislative choice. . . . The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all . . . matters within legislative competence.". **Tigner v. Texas**, 310 U. S. 141, 149 (1940).

These are questions of policy, which only Congress can resolve. This Court cannot pick and choose, or make the delicate adjustments which are the essence of the legislative process.

An instructive analogy is afforded by **United States v. Cooper Corp.**, 312 U. S. 600 (1941), where this Court was

called upon to decide whether the federal government was a "person" who could sue for treble damages under the Sherman Act. There, as here, the statutory language, the legislative history, the supplemental legislation, and the universally accepted practice for decades clearly established a negative answer. But there, far more than here, the changing circumstances called for new relief. With the general expansion of government, and particularly with the passage of one World War and the advent of another, the government had become "a purchaser of enormous quantities of material and supplies." 312 U. S. at 614. It was manifestly unjust to withhold from the government an opportunity to recoup its losses from antitrust violations.

But this Court resisted the temptation to "engraft on [the] statute additions which we think the legislature might or should have made." 312 U. S. at 605. The statute was left as Congress wrote it.

The good judgment and restraint of this Court was vindicated fourteen years later, when Congress created a damage remedy for the sovereign, after extended study of the many relevant considerations and ramifications. In so doing, Congress compromised conflicting interests, and made policy choices, in ways not available to the courts. Congress, in its wisdom, gave the government a claim for single (not treble) damages, and explicitly provided that the government damage suit should not result in a judgment admissible as prima facie evidence, and should not toll the statute of limitations. See pp. 80-81, *supra*.

In short, Congress has resolved the conflicting interests which underlie this case. If further adjustments of those interests are needed, only the legislature has the power to make the requisite adjustments and compromises. If it could be said that "any amelioration is required it is now a matter for Congress, not this Court." **Flora v. United States**, 357 U. S. 63, 76 (1958), **aff'd on rehearing**, 362 U. S. 145 (1960).

CONCLUSION.

The tolling provision of the Clayton Act was passed over half a century ago and has undergone no substantive revision since that time. The decision below, upsetting over 50 years of settled law, is not supported by a single authority, either judicial or secondary (except for one withdrawn and repudiated opinion). There is not the slightest hint in the legislative history of this or any other act that Congress ever intended that FTC proceedings should toll the statute of limitations. If such a revision in the antitrust laws is now to be made, it should be accomplished by legislative action, not judicial invention. For the foregoing reasons, it is urged that the decision of the court below be reversed.

Respectfully submitted,

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